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GIDEON'S TRUMPET: MOURNFUL AND MUFFLED

Lewis R. Katz*

Paul T. White, Jr., black, poor and an ex-convict, spent most of 1968 and 1969 in a Youngstown, Ohio jail. Had this incarceration resulted from a conviction and sentence for a criminal offense, the White case would merit little attention. But the imprisonment of Paul White was not the result of a conviction; Paul White spent 386 days in the Youngstown jail waiting for the State of Ohio to try him.¹

White suffers from all of the conditions that the Warren Court strived to eliminate as factors in the administration of criminal justice. In a Herculean effort, that Court during its sixteen-year tenure sought to achieve equal justice for black people² and attempted to mitigate the

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¹ Paul White was arrested June 20, 1968 in a narcotics raid in Cleveland. He was transported to Youngstown for the alleged offenses, possession of narcotics and possession of instruments used in taking narcotics, which were said to have been committed September 20, 1967. Bond was set at \$5,000 and \$2,500, respectively, for the offenses. At the preliminary appearance, White was persuaded by the judge to waive the statutory ten day time limit within which a preliminary hearing must be held. A mandatory plea of not guilty was entered for White since the court did not have final jurisdiction over the case. At this time White's first lawyer was appointed.

On October 22, 1968, four months after his arrest, two indictments were returned by the Grand Jury against White.

On November 1, 1968 White was arraigned before the Mahoning County Court of Common Pleas, which would have final jurisdiction over the alleged felony. On December 31, 1968, this court reappointed the original lawyer to "proceed" with the case.

At this time White wrote letters to the United States Department of Justice, the Federal Bureau of Investigation, and the American Civil Liberties Union. White received responses to all of his letters but the responding agencies replied that nothing could be done since White had a court-appointed lawyer "on the books."

On April 3, 1969, the second attorney was appointed to White's case, and progressed with the case. On July 9, 1969, White, after having spent over a year in jail, was acquitted of the charges. *State v. White*, Nos. 23739, 23740 (C.P. Ct., Mahoning Co., Ohio, July 9, 1969).

² Ninety years ago the Supreme Court recognized that a criminal defendant in a state trial is denied equal protection of the laws as guaranteed by the fourteenth

effect that personal wealth has on the operation of the criminal process.³

Youngstown need not be singled out for special notoriety. It is a typical community in a state that has handled legal services for the poor in a typical and unimaginative fashion. White received the services of a court-appointed attorney very early in the proceedings, immediately after his first appearance before the committing magistrate, which is before legal assistance becomes mandatory under Supreme

amendment if he is indicted by a grand jury or tried by a petite jury from which members of his race have been systematically excluded because of their race. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). The same principle has been recognized in the federal system. 18 Stat. 336 (1875), as amended, 18 U.S.C. § 243 (1964).

Recently, however, some states have had to be reminded of this commitment to equal protection. While the state laws may give the impression of an impartial selection of juries, the practice was found to fall far short of this goal. Thus in *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (only one Negro picked within memory); *Arnold v. North Carolina*, 376 U.S. 773 (1964) (jurors picked from separated tax returns); and *Whitus v. Georgia*, 384 U.S. 545 (1967) (jurors picked from white cards for whites and yellow cards for Negroes) it was held that a systematic exclusion of Negroes from juries, by itself, resulted in a denial of equal protection.

The representation on juries actually selected does not have to be in proportion to the racial balance in the county, *Swain v. Alabama*, 380 U.S. 202 (1965), but it must be established that there was no systematic exclusion of blacks in the selection process.

³ *Gideon v. Wainwright*, 372 U.S. 335 (1963), overruling *Betts v. Brady*, 316 U.S. 455 (1942). In *Gideon* it was held that fourteenth amendment due process requires that an accused be afforded the right to counsel in state felony prosecutions. *Id.* at 344-45. It has been recognized in the federal courts that the sixth amendment language, stating an accused should "enjoy the right . . . to have the assistance of counsel for his defense. . . ." required the appointment of counsel in all "criminal" cases where a defendant was unable to procure the services of an attorney. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). This right could be waived by the accused. Waiver means the intentional relinquishment or abandonment of this right. *Gideon* implied that a valid waiver of counsel could also occur in state criminal prosecutions.

While *Gideon* did not clarify the standard of indigency, whether the right to counsel also applies to accused misdemeanants in state courts, or at what stage the right to assigned counsel commences, *Douglas v. California*, 372 U.S. 353 (1963), decided the same day as *Gideon*, makes clear that an indigent's right to counsel extends to the first appeal.

Both *Gideon* and *Douglas* were built upon a prior foundation. *Gideon* was preceded by *Johnson v. Zerbst*, *supra*, and *Powell v. Alabama*, 287 U.S. 45 (1932), in which the Court held the right to counsel for capital cases in the states was a fundamental safeguard of liberty and justice.

Likewise *Douglas* was preceded by *Griffin v. Illinois*, 351 U.S. 12 (1956), which held that where a state does grant appellate review in a criminal case, the Constitutional guarantees of due process and equal protection require that indigent defendants be afforded a transcript of the relevant evidence and all filing fees in order to obtain adequate appellate review of alleged trial errors. See also *Cop-*

Court dictates. Furthermore, in Youngstown there is a disorganized release-on-recognizance program⁴ enabling the release of a defendant without the posting of a bail bond. Finally, Ohio like all other states in this country guarantees to its citizens a speedy trial.⁵

These protections and guarantees are meaningless, however, when the appointed attorney fails to insure that they accrue to the benefit of his client. White was visited in jail by his court-appointed counsel twice. The attorney never raised the possibility of release on recognizance with the court, although such a request would most likely have been denied because of White's previous record. The attorney did nothing when the grand jury, meeting shortly after White's arrest, failed to act in the case. It was only when White started to write letters to the United States Department of Justice, the Federal Bureau of Investigation and the American Civil Liberties Union to complain of his dilemma that the court-appointed attorney took action.⁶ He withdrew from the case.

Nine months after White was incarcerated, a second attorney was

pedge v. United States, 369 U.S. 438 (1962) (in forma pauperis application must be granted unless appeal is clearly frivolous); Burns v. Ohio, 360 U.S. 252 (1959) (filing fee for appeal must be waived for indigent defendant).

⁴ For a description of the operations and results of the Vera Foundation Project, see Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67 (1963).

Basically, an initial investigation is made, taking into account a number of factors. The results of this investigation are used to determine whether it is probable that the defendant would return for trial if released on his own personal recognizance.

⁵ ALA. CONST. amend. VI.; ALAS. CONST. art. I, § 11; ARIZ. CONST. art. II, § 24; ARK. CONST. amend. VI; CAL. CONST. art. I, § 13 cl. 1; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. Decl. of Rights § 11; GA. CONST. art. I, § 2-105; HAWAII CONST. art. I, § 11; IDAHO CONST. art. I, § 13; ILL. CONST. art. II, § 9; IND. CONST. art. I, § 12; IOWA CONST. art. I, § 10; KANS. CONST. Bill of Rights §§ 10, 18; KY. CONST. § 14; LA. CONST. art. I, § 9; ME. CONST. art. I, § 6; MD. CONST. art. 21; MASS. ANN. LAWS. ch. 212 § 24, ch. 220 § 13A (1966); MICH. CONST. art. I, § 20; MINN. CONST. art. I, § 6; MISS. CONST. art. III, 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. III, § 16; NEB. CONST. art. I, § 11; NEV. REV. STAT. § 178.556 (1967); N.H. CONST. Bill of Rights art. 14; N. J. CONST. art. I, § 8; N.M. CONST. art. II, § 14; N.Y. CODE CRIM. PROC. § 188 (1958); N.D. CONST. art. I, § 13; OHIO CONST. art. VIII, § 11; OKLA. CONST. art. II, § 20; ORE. CONST. art. I, § 10; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 10; S.C. CONST. art. I, § 15; S.D. CONST. art. VII, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. 10; WASH. CONST. art. I, § 10; W. VA. CONST. art. III, § 18; WIS. CONST. art. I, § 7; WYO. CONST. art. I, § 10. See also *Klopper v. North Carolina*, 386 U.S. 213, 222-23 (1967) (speedy trial applied to states through 14th Amendment).

⁶ None of these agencies could help since, officially, White had an attorney "on the books."

appointed by the court to represent him.⁷ This attorney visited extensively with his indigent client and pressed the prosecutor and the court to set a trial date. Trial was finally scheduled for the second week in July, and on July 9, 1969, after spending more than one year in jail, Paul T. White, Jr. was acquitted on both counts of the indictment.⁸

The *White* case serves the purpose of pointing up the inadequacies in how our society provides legal assistance for persons charged with serious crimes. Many state and community programs have been hastily designed to meet the immediate requirements set forth in *Gideon v. Wainwright*.⁹ Uppermost in many minds has not been fulfillment of the spirit of the *Gideon* decision—to provide competent and effective legal assistance to those unable to provide their own—but all too often the emphasis has been on achieving the least costly method of complying with the Supreme Court mandate that counsel must be provided. Similarly, we in the legal profession have been derelict in our responsibility to the courts, the public, and the administration of justice in failing to effectively police how our own colleagues discharge their responsibilities.

The scope of this article is four-fold: (1) a description of the principal methods used to provide legal assistance to persons charged with criminal offenses; (2) a discussion of when legal assistance is constitutionally required and actually needed; (3) a discussion of the quality of the services presently being rendered, and finally, (4) a proposal for the reorganization of legal assistance to persons charged with criminal offenses.

I. PROVIDING LEGAL ASSISTANCE

If the proverbial man-on-the-street were ever asked to design a system for the administration of criminal justice with the major aim being rehabilitation of the offender and protection of society, he would undoubtedly concentrate all available assistance on the minor offender, for this would be the person who had committed the lesser transgression and the person closer to being an asset, rather than a liability, to his society.

But when that same effort is entrusted to persons with legal training and backgrounds, other considerations come into play. Realizations on their parts that serious offenses carry graver penalties and that court

⁷ White's second attorney, Nathaniel Jones, is a very capable criminal lawyer in Youngstown. Since the *White* trial, Jones has undertaken a position with the NAACP. *Cleveland Plain Dealer*, Sept. 2, 1969, at 6, col. 4.

⁸ On July 9, 1969, White was acquitted. See note 1 *supra*.

⁹ See note 3 *supra*.

proceedings in such cases are more intricate and formal have dictated an allocation of assistance to defendants charged with felonies and little or none to those charged with misdemeanors. In 1963 the Supreme Court formally extended the Sixth Amendment's right-to-counsel guarantee to the states.¹⁰ It was only in a concurring opinion to that case, written by Mr. Justice Harlan, that any limitation to this right was acknowledged.¹¹ As so often happens, the broad constitutional ruling enunciated by the Court has been modified in practice to keep within the limiting factors presented by the concurring Justice.¹² To date the Court has consistently refused to extend the *Gideon* requirements to misdemeanors, and the states have been free to limit

¹⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹¹ Justice Harlan therein comments:

The Court has come to recognize, in other words, that the mere existence of a *serious criminal charge* constituted in itself special circumstances *requiring the services of counsel at trial . . .* at least as to offenses which, as the one involved here, carry the *possibility of a substantial prison sentence*. *Id.* at 351 (emphasis added).

¹² The Supreme Court's failure to enunciate a narrower rule about misdemeanor violators has resulted in broad disparities. Shortly after the *Gideon* decision, a case which had previously been *Patterson v. State*, 227 Md. 194, 175 A.2d 746 (1961), was reversed by the Supreme Court. *Patterson v. Warden*, 372 U.S. 776 (1963) (per curiam). In the decision the Court vacated and remanded the case for "further consideration in light of *Gideon v. Wainwright*." *Id.* at 776. In this case the defendant was convicted of carrying a deadly weapon concealed on or about his person, carrying openly a deadly weapon with intent to injure, and carrying a deadly weapon in an automobile. The complexity of the three charge indictment and extent of potential penalty (two years) were considered "serious" enough to necessitate provision of counsel at this time. This provoked speculation that misdemeanors, at least "serious" ones would be compelled to follow the federal pattern and appointment of counsel should be made. (Only "petty offenses," involving a sentence of six months or less, are not "serious" enough in the federal system to warrant appointment of counsel.) 18 U.S.C. § 1 (1964).

Since *Patterson*, however, the Court has consistently denied certiorari and refused any subsequent review of misdemeanor cases. In *Letterio v. People*, 16 N.Y.2d. 307, 266 N.Y.S.2d 368, 213 N.E.2d 670 (1965), cert. denied, 384 U.S. 911 (1966), the defendant was fined \$1,030 (or 135 days in jail if unable to pay) plus 42 days imprisonment for ten moving traffic violations. The New York court said that defendant need not be told of the right to counsel or informed that he had a right to retain counsel and have an adjournment for that purpose. Apparently the complexity of the charge and the penalty attached were not as "serious" as in *Patterson* and therefore did not attract the attention of the Court.

Recently, the inconsistency of the courts in this area has been extremely evident to all. *State v. DeJoseph*, 3 Conn. Cir. 624, 222 A.2d 752, cert. denied, 385 U.S. 982 (1966). *DeJoseph* was a nonsupport case. The defendant was convicted of this misdemeanor and sentenced to six months. The Supreme Court did not review despite the fact that in *Arbo v. Hegstrom*, 261 F. Supp. 397 (D. Conn. 1966), a federal district court had granted a man convicted of the same crime a writ of habeas corpus on the grounds that the state had failed to appoint him counsel.

assistance to persons charged with felonies.¹³ With these factors as guidelines, the states set forth to comply with the constitutional requirement.

A. Assignment of Private Attorneys

By far the most common method utilized for providing counsel to indigent defendants throughout the United States is the case-by-case assignment of a private attorney.¹⁴ It is the method in use in Iowa, where the appointment is made by the district court.¹⁵

The assignment of private attorneys has been adopted in over ninety percent of the counties in this country.¹⁶ Its popularity can be accounted for in a number of ways. In those communities where the extent of criminal work is not too great, the occasional appointment of a private attorney to represent a defendant at state expense is far less costly than the expense that would be incurred by the operation

The Supreme Court again denied certiorari in *Winters v. Beck*, 385 U.S. 907 (1966), where a Negro, charged with "immorality," a misdemeanor, was convicted and sentenced to three months imprisonment and fined \$254. Under the \$1-a-day statute, ARK. STAT. ANN. § 19-2416 (1956), the indigent defendant had 254 more days added to his original 30 day sentence. *Winters v. Beck*, 239 Ark. 1093, 397 S.W.2d 364 (1965). Finally, it is important to note that in *Toledo v. Frazier*, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967), the Lucas County Court of Appeals decided that one accused of a misdemeanor must be advised of his right to retain counsel by virtue of OHIO REV. CODE ANN. § 2937.02 (Page 1966), but the state or municipality was not constitutionally obligated to furnish counsel to an indigent misdemeanorant.

¹³ Provision is made in Iowa for the appointment of counsel in indictable misdemeanor cases. The rate of compensation is to be decided by the court in each case. IOWA CODE § 775.5 (1966).

In ordinary misdemeanors there is no provision made for appointment of counsel. A 1965 survey made for the American Bar Association indicated that, in Iowa, only in the full operation of municipal courts will counsel be readily available if the accused should request. See Carlson, *Appointed Counsel in Criminal Prosecutions: A Study of Indigent Defense*, 50 IOWA L. REV. 1073, 1083 (1965).

¹⁴ Findings confirm that the assigned-counsel system is the most common system. This type of service is available to over half of the total population of the country.

For a general consideration of the method, see L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 15-38 (1965) [hereinafter cited as L. SILVERSTEIN].

¹⁵ See Carlson, *supra* note 13, where the author found the following methods in use:

In the more populous counties the court will often appoint defense counsel from the judge's list of names, which list includes attorneys he knows are willing to accept appointments. In the smaller counties a broader spread of representation in criminal appointments is generally noted. There the judges tend to make appointments from the whole roster of the county bar association. *Id.* at 1086.

¹⁶ REPORT TO THE NATIONAL DEFENDER CONFERENCE xi (1969) [hereinafter cited as NATIONAL DEFENDER CONFERENCE].

of a permanent defender operation. The cost factor has become the primary concern in the maintenance of local government services and is a logical and justifiable explanation for the maintenance of the private counsel system in those communities—mostly rural—where the crime rate, and consequently the criminal court business, has not skyrocketed.¹⁷

In urban areas, however, where the criminal court dockets are overcrowded and where the increased expense to the community of providing legal assistance to indigent defendants has become a concern, the maintenance of an appointed counsel system is often not financially justifiable, and never would be if assigned counsel were adequately compensated. In many parts of the country the perpetuation of this system and the rejection of the defender concept for providing legal services can be attributed to the opposition of the practicing bar to the institutionalization of legal services, especially where a fee may be involved. Where there is authorization for the payment of a fee for legal services, even if it is by the community and acknowledged to be inadequate,¹⁸ the continued feeling is that fee must be reserved to the private bar. In fact one urban bar association originally filed suit to prevent the formation of a defender agency in its city.¹⁹ Yet it is in these urban areas that the inadequacies of providing equal justice to indigent defendants are most pronounced.

The most common method for the appointment of counsel is made by the court's referring to a rotating list made up of members of the bar who have indicated an interest in serving as attorneys for the

¹⁷*Id.* at 60-61.

¹⁸ See THE IOWA STATE BAR ASSOCIATION, ADVISORY SCHEDULE OF MINIMUM FEES 14 (1968) where it is recommended that for criminal cases in the Iowa District Court actual trial work per day received a value of eight units. To this should be added a one unit charge for trial preparation. For 1966, the Association recommended that the value of one unit should be equal to \$25.00. Therefore, the fee would be a minimum of \$225.00. See also ABA CANONS OF PROFESSIONAL ETHICS No. 12.

¹⁹ See *Azzarello v. Legal Aid Society*, 24 Ohio Op. 263, 185 N.E.2d 566 (Ohio App. 1962); accord, *State ex rel McCurdy v. Carney*, 172 Ohio St. 175, 174 N.E.2d 253 (1961). For a general note on the problem, see Annot., 11 A.L.R.3d 1218 (1967), citing *Jacksonville Bar Ass'n v. Wilson*, 102 So. 2d 292 (Fla. 1958), where an attorney challenged the validity of a lawyer-referral service established by the Bar Association which provided a method for aiding prospective clients who could pay the fees to contact lawyers in the county for consultation and service. This system was held to be an aid toward preventative measures and advice, and not unethical. *Id.* at 295. Only these lawyers, members of the Florida Bar who practiced in Duval County, could qualify for membership in this service if they agreed to accept five dollars as one-half hour consultation fee, and limit service charges thereafter to a reasonable amount. *Id.* at 293.

poor.²⁰ At times a judge will bypass the normal order of rotation²¹ to select a specific attorney for a specific case or he may ignore the list entirely and request an attorney not on the list to take a certain case. Judges have even been observed to look around a courtroom, sight an attorney who happens to be present, and appoint him to a case.²² In many communities where there is no list, a judge selects any attorney whom he wishes, sometimes because of his confidence in that attorney's competence, sometimes because of friendship or political kinship with that attorney, and sometimes because he realizes that an attorney may need the business. The way appointments are made varies according to the personality of the judge and the extent of his commitment to the concept of equal justice. Some judges are highly selective, bypassing those attorneys who will do nothing but plead the defendant guilty, but others concentrate appointments only on those attorneys who will plead the defendant guilty and not clog the courts' docket with trials. Usually bypassed are those attorneys

²⁰ As to the point in the procedure when this appointment is made, generally in the United States, and specifically by statute in Iowa, the assignment is made at the arraignment when the defendant enters his plea to the indictment that has been returned against him. IOWA CODE § 775.4 (1966). See also SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *EQUAL JUSTICE FOR THE ACCUSED* 48 (1959) [hereinafter cited as *EQUAL JUSTICE FOR THE ACCUSED*]; Carlson, *supra* note 13, at 1081.

²¹ It has been reported that procedures in 10 sample counties in Ohio were generally uniform in that the judge or his bailiff compiles a list of willing attorneys, and selection is made from the list in rotation. An interesting exception to chronological selection has been reported in Cuyahoga County (Cleveland), where a definite attempt is made to appoint Negro attorneys. 3 L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 587 (A Field Study and Report for the Am. B. Foundation 1965) [hereinafter cited as 3 L. SILVERSTEIN]. It should be noted that these three volumes by Mr. Silverstein represent the basic findings which were later condensed into a one volume book of the same name, cited note 14 *supra*.

²² *Id.* at 589, where it is reported that in Montgomery County, Ohio (Dayton), this procedure has been observed. See also Dimock, *The Public Defender: A Step Toward A Police State?*, 42 A.B.A.J. 219-20 (1956), for a reference to the "row of seedy characters," i.e., attorneys waiting for appointments seated in the courtroom or milling around the halls.

Howard James, reporting for the Christian Science Monitor, has also testified to this disturbing occurrence:

I have watched this system in operation. Some appointed lawyers are both skilled and conscientious. But all too often the judge, knowing he must appoint an attorney to satisfy the higher courts in case of later appeal, points his finger at the nearest available lawyer.

Often as not, the competent lawyer spends five minutes whispering in a corner of the courtroom with his client, then—without any investigation in the man's behalf—offers to plead him guilty.

Judge Temple Driver, a noted Judge from Wichita Falls, Texas, sums it up for much of the nation when he says: 'Appointed counsel can be about the same as no counsel at all.' The Christian Science Monitor, June 7, 1967, at 9, col. 4.

who raise all possible defenses—to some judges, too many defenses.

While a judge will usually ignore the rotating list to appoint an experienced criminal lawyer to a capital case, rarely does he do so to appoint attorneys with particular expertise in cases involving other charges—an attorney with an accounting background to an embezzlement case for example. Although strict adherence to the regular rotational sequence would eliminate appointments predicated upon common politics, friendship, and the like, it would also eliminate the occasions when judges do tailor the assignments to the seriousness, technicalities, and peculiarities of an individual case. The almost universal recommendation emerging from all studies that have considered the assigned counsel system is that it is best effectuated by adherence to a regular rotation, although all studies also conclude that deviation can be made in capital cases.²³

The discretion that is not exercised with general appointments is wielded when the charge is homicide. The gravity of the offense and the possible punishment if the defendant is convicted have apparently been impressed upon the judges to the extent that attorneys appointed to represent the accused are carefully selected. Judges, prone to ignore the lists of volunteer attorneys when a homicide charge is filed, appoint experienced, well-reputed attorneys regardless of whether these men have indicated a desire to receive court appointments. There are three apparent reasons for this different policy. First, the compensation for defending a homicide case, while not lucrative, is certainly much more realistic than for any other offense.²⁴ While the attorneys who scramble for any appointments certainly seek homicide cases, they do not as a rule get them because they usually lack the desired experience and ability. Secondly, in a homicide case in many communities two attorneys are appointed to divide work, responsibility and pressure, thus enabling judges to make sure that at least one of the attorneys is qualified even if the other should be a political appointment. Finally, the publicity attached to homicide cases keeps the

²³ It is generally agreed that exceptions to the rotation procedure should be made in capital and other serious cases. Accordingly, it has been said that "Ohio judges expend considerable effort in persuading eminent, distinguished, and experienced counsel to accept the responsibility of representing defendants," in these serious cases. 3 L. SILVERSTEIN, *supra* note 21, at 606.

Thus, although a general conclusion and almost universal recommendation from all studies that have considered the assigned counsel system is that it is best effectuated by adherence to a regular rotation, all also agree that deviation can be made in capital cases. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 7 (Tent. Draft 1967) [hereinafter cited as PROVIDING DEFENSE SERVICES]; EQUAL JUSTICE FOR THE ACCUSED, *supra* note 20, at 87; 3 L. SILVERSTEIN, *supra* note 21, at 606.

²⁴ See THE CUYAHOGA COUNTY BAR ASS'N, THE MINIMUM FEE SCHEDULE OF THE CUYAHOGA COUNTY BAR ASSOCIATION (1966).

case before the public and reduces the short-shrift approach that an attorney may give a regular case unattended with newspaper publicity.

Private attorneys who ask that their names be placed on the assignment list do so for several reasons. Within the bounds of generalization, however, it is possible to characterize the four types of lawyers most often seen in indigent cases.

Many of the established and experienced attorneys involved in indigent defense work are there because they believe that the attorney, like the doctor, is obligated by the very nature of his profession to devote some time to that portion of the community unable to pay his fee. This attorney enters the case with the knowledge accumulated during his years in practice and with a genuine concern about the welfare of his client. Although his experience in law and in trial practice may be broad and will aid him greatly in preparation of the case, he probably has not had extensive criminal defense work. Few private practitioners have. His knowledge of the technical aspects of criminal law will most likely be limited.²⁵ These private attorneys, however, in spite of the financial drawbacks, exert the same energies for an indigent client as they do for fee-paying clients. They are not appointed in the great majority of cases, though, because they are not actively seeking clients.

An incident in point is an Indiana case where a highly respected business law practitioner was appointed to represent an indigent charged with a serious offense. The attorney worked exhaustively on the case, did his own investigative work, and tried every legal angle he knew. The defendant was convicted and went to the penitentiary where he learned not only of his rights under the state's speedy trial statute but also that his attorney's failure to demand a speedy trial and to raise the defect prior to trial was considered a waiver of those rights. Certainly no client ever had a more devoted advocate in his corner, and rarely has anyone been paid so little for such labor, but the attorney was inexperienced in criminal law and was, in essence, inadequate counsel.²⁶

²⁵ But see PROVIDING DEFENSE SERVICES, *supra* note 23, at 27, where it is asserted:

While it is imperative that assigned counsel possesses the skills of the advocate which enable him to react quickly and wisely to the exigencies of a trial, it is not necessary to limit participation to those who are experts in criminal law.

This report recommends a "standard of 'familiarity' with the practice and procedure of the criminal courts" with a concomitant increase in "the establishment of programs of continuing legal education adequate to assist the trial lawyer . . . in keeping pace with developments in criminal practice." *Id.* at 28.

²⁶ This case came to the attention of the author while practicing law in that state.

It is true that attorneys who maintain an exclusively non-trial, office practice rarely answer the call for service to their court and community by volunteering to represent indigent defendants. Although arguments can be made for the assignment of experienced trial lawyers who do no private criminal work to represent indigent defendants, it is wrong for a court to appoint "office" lawyers who occasionally volunteer for indigent work because they are fulfilling formal, not substantive, requirements of the right to counsel.²⁷

Another group of established, experienced attorneys who volunteer to represent indigent clients do so because of an interest in criminal law itself. They may be practicing in communities where the amount of private criminal work is scarce or they may not have been selected by those private clients with criminal law problems seeking an attorney. In most instances these lawyers have the same attributes and limitations as the preceding group.

But many experienced attorneys who perform defense work for the indigent, unfortunately, do not undertake it either out of a sense of duty or because of an intrigue for criminal law. On the whole, the more experienced the attorney, the less likely he is to do indigent work. Usually the attorney with experience who is involved in indigent work has answered a request by the court. The exception—the experienced attorney who regularly seeks indigent assignments—does so for money, even though that money is totally inadequate as remuneration for a competent defense.²⁸ The attorneys in this category, for the most part, need whatever sum is forthcoming from any case. It is to these lawyers who have been rejected or overlooked by

²⁷ See PROVIDING DEFENSE SERVICES, *supra* note 23, at 27.

²⁸ See, e.g., THE CUYAHOGA COUNTY BAR ASS'N, THE MINIMUM FEE SCHEDULE OF THE CUYAHOGA COUNTY BAR ASSOCIATION (1966), which states in the Foreword: "[t]his schedule of fees has been determined by assuming simple, or common circumstances, involving a relatively minimum of time, effort, and professional ability as well as professional responsibility," but its suggested minimum fees, as set out below, provide quite a contrast with the statutory maximum of \$300 allowed by OHIO REV. CODE ANN. § 2941.51(B) (Page 1967) for felony cases other than first or second degree murder, and this maximum is set regardless of the number of assigned counsel or the number of counts contained in the indictment. *Id.* at I.

The following is the schedule:

COMMON PLEAS—CRIMINAL

A. PLEADINGS

1. Habeas Corpus	
a. preparing and filing	\$150.00
b. appearance	150.00
2. Motions—to quash, to suppress evidence	150.00
3. Pleas in abatement	150.00
4. Demurrer to Indictment	150.00
5. Bill of Particulars	150.00
6. Notice of Alibi	150.00

the fee-paying public that society all too often entrusts the defense of indigents, a group to whom it may owe its highest obligation.

As their major interest in seeking indigent defense work is financial and as the financial reward for a protracted case—for example, a trial,—is minimal, the attorney in this category zeroes in on a quick consultation and pleads to either the charge itself or to the best deal that can be made with the prosecutor.²⁹ Too many attorneys in urban areas who seek and receive these appointments find the accumulated "inadequate" fees lucrative and have come to depend upon them financially, hurriedly finishing one case to seek the next. This lawyer's practice survives partly because the defendant is generally pliant, eager to heed the wishes and advice of his attorney, and usually unaware of the defenses and alternatives available to him. This attorney is not at all discouraged by the type of judge whose passion is for a current calendar not clogged by an extensive number of trials. Indeed, where you find one of these judges, you find these attorneys, milling around the courtroom during arraignments to pick up assignments.³⁰ Tragically, the attorney may hold a quick conference with

B. TRIAL AND MISCELLANEOUS

1. Appearance for Plea of guilty and for sentence	
a. Misdemeanors	100.00
b. Felonies other than homicide	250.00
2. Appearance at arraignment with or without plea	100.00
3. Arranging Bail only	50.00

C. SPECIFIC ACTIONS

1. Homicide	
a. First Degree	3,000.00
b. Second Degree	2,000.00
c. Manslaughter	1,000.00
2. Other Felonies, including one day of trial	350.00
3. Assigned cases see RC 2941.51.	

A comment upon the situation in Ohio regarding fees for court appointed counsel seems appropriate: "A statutory maximum of \$300 for the trial of a serious felony which may take many days is most unjust." 3 L. SILVERSTEIN, *supra* note 21, at 606.

²⁹ For an excellent discussion of the role of defense counsel in the guilty plea process with its implications to defendants and the entire administration of criminal justice, see D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 197-230 *passim* (1966). Therein it is stated that the function of defense counsel in guilty plea cases falls roughly into two broad categories:

- 1) "expert evaluation of the appropriateness of the guilty plea,"
- 2) "aid in obtaining charge and sentence leniency by plea negotiation." *Id.* at 198.

³⁰ It has also been suggested that defense counsel performs another function for these judges in guilty plea cases, i.e., judges rely on counsel as a check on the accuracy of the plea and they generally rest easier in accepting a guilty plea if the defendant is represented by counsel. *Id.* at 201. In light of the type of defense counsel we are dealing with, this reliance has been questioned. Newman states that

[t]his reliance . . . is based on an assumption that the lawyer thoroughly researches the case and brings his professional competence to bear on the

his newly-assigned client and return to the bench that same day to plead him guilty. Under no circumstances can this be considered adequate counsel.³¹ It would seem that the disposition of such a case is predicated upon the attorney asking the client just one question: "Did you do it?". The case is then resolved on the basis of the answer to that question, irrespective of the defendant's motivations for admitting to the offense, or of existing defenses and possible mitigating circumstances.

Another type of attorney who comprises the group to which most indigent assignments are made is the lawyer recently graduated from law school and admitted to practice. He is hampered by a lack of knowledge of criminal law and a lack of experience, but his client is better represented by this attorney than by one who does indigent defense work for financial gain, for this young lawyer brings to the task a serious desire for experience and, frequently, an eagerness to serve his client in the best possible way. Unfortunately, the training of this inexperienced lawyer comes at the expense of the indigent. Some balance between the good and bad aspects of assigning such an attorney could be insured if the younger practitioner were to be appointed to work with and assist a more experienced attorney on perhaps a half dozen indigent cases before he is made the sole counsel on

appropriateness of the plea decision. . . . While there is no doubt that some guilty pleas do result from such a detailed, shared analysis of the case, the quality of representation in routine guilty plea cases and the conditions under which representation occurs raise some questions about whether this image is generally true. *Id.* at 201.

³¹ In order to evaluate "adequate" representation of guilty plea defendants, different standards from those found in representation at trial may be required. However, it has been said that "successful representation of the guilty requires knowledge and skills no less demanding than representation at trial." *Id.* at 198. Thus differences in knowledge and skill have been recorded. In this regard Newman says:

To the extent that effective representation in guilty plea cases is desired, it is important that counsel have sufficient understanding of the whole nontrial process, including sentencing, in order to advise his clients adequately.

. . . One function of defense counsel in guilty plea cases is to steer his client through the pretrial maze, maximizing his knowledge of the substantive law and of court practices not only to determine to *what* his client pleads guilty but *when* and *before which* judge, if a choice is available, in order to effectuate the most favorable consequences of the plea.

. . . From all sources, judges, prosecutors, and defense attorneys themselves, come indications that a fundamental skill of competent defense attorneys in guilty plea cases is knowledge of judicial biases regarding offenses and offenders, knowledge of variations in customary practices of the courts in accepting pleas and sentencing thereafter, and attendant skills in arranging the steering of a case to a suitable judge. The decision of which judge to plead before is about as important a function of defense counsel as what offense is agreed upon as the basis of the guilty plea. *Id.* at 209-12.

the case, or better still if his internship could be completed while he were still in law school.³²

While the disadvantages and inadequacies of the assignment system stand out prominently, there are several inherent advantages. The more contact attorneys have with indigent criminal law, the better able they are to serve the community at large when faced with other criminal law problems. Furthermore, the lawyer not engaged exclusively in a criminal law practice does not become jaded by seeing the same problems day after day and will not tend to classify these defendants as groups rather than as individuals.³³

B. The Public Defender

The establishment of the Public Defender Office is the result of a realization that equal justice demands that indigents receive competent, experienced and specialized defense at least on a par with the talents at the disposal of the state in the prosecutor's office. Deficiencies found in the assigned counsel system provide the strengths of the defender system, but this is not to indicate by any means that all of the answers presently lie in the defender concept, nor that it is without its own problems and weaknesses.

Defender operations in this country are classified as public, private,

³² Systems which combine the eager inexperienced attorney as co-counsel with an experienced one have generally been suggested as improvements for assigned counsel systems everywhere. This procedure not only bolsters the indigent defendant's confidence in his representation, it serves as a valuable training ground for the recently admitted member of the bar. Such has been the traditional method of training trial attorneys. A system of multiple panels is utilized in the District of Columbia and a lawyer in the inexperienced panel must have actively participated in the trial of two felony cases to be included in the panel of those eligible to serve as chief counsel in noncapital cases, and a separate panel of highly reputable defense counsel is maintained for assignment in capital cases. *EQUAL JUSTICE FOR THE ACCUSED*, *supra* note 20, at 87; *PROVIDING DEFENSE SERVICES*, *supra* note 23, at 28-29.

³³ In studying the manner in which the Municipal Courts of Ohio handle misdemeanor cases, the author found:

One of the most regrettable factors in the failure of the municipal court system to dispense justice lies in the personalities of many judges and prosecutors. More than at any other judicial level, the judge in the municipal criminal court is autonomous in that he is better able to set the tone of his court without any appellate authority. In his courtroom there is rarely an attorney involved—only one in every four cases—and seldom is a transcript kept of the proceedings . . . If the judge shows contempt for the defendants and witnesses, he encourages similar attitudes and behavior from the court's other officials. Katz, *Municipal Courts—Another Urban Ill.* 20 CASE W. RES. L. REV. 87, 91 (1968).

For other comments on leading defendants through the crowded dockets of municipal courts, see THE U.S. NAT'L ADVISORY COMM. ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 183 (1968).

or public-private.³⁴ The oldest, serving Los Angeles county, was established in 1914, long before the Sixth Amendment right to counsel was made applicable to the states.³⁵ It is exclusively financed by state and local governments, and thus is the largest public defender operation in the country. For the fiscal year 1968-69, four and a half million dollars was appropriated to finance the operation.³⁶

The private defender is a non-profit corporation, generally a part of the Legal Aid Society, whose governing board is made up of public officials and leading attorneys in the area. Its funds are derived from public subscription and foundation grants. The Legal Aid Society in Chicago during its early history handled some criminal matters and was a private defender operation until 1933 when the Cook County Public Defender office was created. It has been financed since from public funds.³⁷

In New York City the Legal Aid Society, a non-profit corporation, handles civil and criminal cases.³⁸ It has maintained its independence not withstanding the injection of vast public moneys to supplement its budget.³⁹ The New York Legal Aid Society represents the largest public-private defender operation in the United States.⁴⁰

Although the examples cited represent the three largest cities in the country, defender offices are maintained in numerous smaller communities. The size of defender operations range from the Los Angeles one with 250 attorneys to the New York Legal Aid Society which has 120 attorneys in the criminal division, to Columbia, South Carolina, where two staff attorneys function as the office of Public Defender and to Columbia, Missouri, where one attorney is the Public Defender

³⁴ The true public defender system is set up along the lines of a public prosecutor system. The state, or subdivision of the state such as county or city, will pay salaried lawyers who devote all or a substantial part of their time to the specialized practice of representing indigent defendants. These lawyers may be elected officials or appointed. They may serve a specified term, or may remain as long as they retain the confidence of the appointing body. These lawyers will be appointed to all or part of the indigent work in the courts.

The private defender system can operate along the lines of the public defender system with the exception that the lawyers will not be elected and the finances will come from a private organization. The Legal Aid Societies are the usual examples of a private defender system.

The public-private defender system, as its name implies, is financed from state and private contributions. Usually the operation is controlled by the board of trustees of a nonprofit corporation. See *Forward* to NATIONAL DEFENDER CONFERENCE *supra* note 16, at xi.

³⁵ *Id.* at 3.

³⁶ *Id.* at 4.

³⁷ *Id.* at 6.

³⁸ *Id.*

³⁹ *Id.* at 6.

⁴⁰ *Id.*

serving a two-county area.⁴¹ In Florida, Massachusetts, Minnesota and New Jersey, the defender operation is statewide with coordination of all local defense services by a state coordinator.⁴²

The key to the effectiveness and success of a Defender operation is the person selected to head the office. Certainly, the zeal and devotion that he brings to the office will, to a great extent, determine the caliber of the representation provided by that operation. If it is a small operation, his own ability as an advocate will be constantly tested, and if he is coordinating the services provided by a large staff his management and leadership qualifications will set the tone for the operation. Consequently, the method of selection and the compensation for the position are critical matters. There is no justification for the creation of a salary scale that does not provide compensation for the defender and his deputies at parity with those paid by the community to the prosecutor and his deputies.⁴³ Another essential step to insure quality representation from the defender's office is to structure the appointment so that the defender is not continuously answerable to those who appointed him and is thereby insulated from political pressures. If the defender is appointed by judges and could be removed from office by that group, he could conceivably be intimidated into doing nothing that might offend those judges, for example, rarely challenging their rulings. Similarly, if the defender is a political appointment, he might be subject to political pressures. The public-private defender in New York, the Legal Aid Society, while receiving public funds has managed to provide the necessary insulation.⁴⁴ The overseer of the defender operation there is the Board of Trustees of the Society, an independent group removed from public and political pressures.

Legal personnel staffing the defender's office come largely from the same source which provides most of the assigned attorneys—recent law school graduates just admitted to the bar. Like their peers

⁴¹ *Id.* at 13.

⁴² See FLA. STAT. ANN. §§ 27.51, 27.53 - .59, 909.21 (1966); MASS. ANN. LAWS. ch. 221, § 34(d); ch. 276, § 37(a); ch. 277, §§ 47, 55, 56; ch. 263, § 5; ch. 123(a), § 5; MASS. SUP. CT. RULES § 3:10 (1966); MINN. STAT. ANN. §§ 611.14-611.29 (1969); N.J. STAT. ANN. §§ 2A:158A-1 to -25 (1969).

⁴³ H.B. 514, 107th Gen. Ass., Reg. Sess. (1967-68), was a bill proposed in the Ohio House which would have created a county public defender system. The Bill was defeated on August 7, 1967 in the Ohio House of Representatives by a vote of 42-47. One interesting provision of the proposed legislation was the inequality between the salaries of the prosecutor's and defender's office. The Bill would have set the defender's salary at two-thirds that of the prosecutors'.

⁴⁴ See NATIONAL DEFENDER CONFERENCE, *supra* note 16, at 6. Control of the New York office is placed in the hands of a board of trustees which insures the independence of the office from undue judicial supervision or improper influence.

in private practice, these men come to the task with very little or no criminal law and trial experience. But unlike the young lawyer in private practice, the novice attorney in the defender's office is instantly immersed in criminal law and procedure problems, the volume of which facilitates and necessitates a rapid growth of expertise in this area unattainable in all but very few private practices. Under the guidance of the experienced members of the defender's staff, the young attorney is generally competent to stand on his own within a relatively short time.⁴⁵

Unfortunately, it has to be recognized that this type of institutional practice has not been favorably looked upon as a career objective. It is generally agreed that a few years experience will give the young attorney a good grounding in the subject matter, extensive trial experience, and good contacts for the time when he decides to enter a firm or strike out on his own. While the defender operation does a service in training young lawyers in criminal law and thereby provides the community with future private practitioners who will be able to serve the fee-paying public with competence, rapid and massive turn-overs in staffing prevent the institution from amassing for itself a large number of attorneys with experience.⁴⁶ This problem is not insurmountable; there are at least two alternatives: (1) appointments to the defender staff should be restricted to attorneys with at least two years experience or (2) career opportunities within the defender service should be made more attractive to retain trained personnel. The former proposal, though, may be quite unrealistic for it is predicated upon the willingness of attorneys to give up private practice after completion of the leanest and most difficult two years. Graduating law students who are interested in public service will already have been siphoned off into other agencies where a like-requirement is not imposed, as in most prosecutor's offices. Talent available to the defender service would then most likely come from the pool of experienced attorneys who today in many urban areas provide most of the assistance to indigents under an assignment of experienced attorneys—those who have had difficulty establishing themselves in private practice.

Blatantly needed at the onset is an overhaul of community and professional thinking about the public defender. Too frequently the defender's office is pictured by the public as the repository of hopeless

⁴⁵ Many states have authorized intern and training programs for law students while still in school. Programs of this sort have been useful in giving the young attorney experience and competence. McArdle, *Law Students' Participation in N.D.P. Projects*, XXIV THE LEGAL AID BRIEF CASE 262 (1965).

⁴⁶ For commentary on the problems of amassing a career service, see PROVIDING DEFENSE SERVICES, *supra* note 23, at 34-37; 1 L. SILVERSTEIN, *supra* note 21, at 43-44.

cases which no one else would take. This may be caused partially by an unfair assignment system but more likely by a lack of understanding on the part of the public of the role of a defense attorney. An attorney engaged in an exclusive criminal law practice will have a share of hopeless cases and a large proportion of guilty pleas, this being especially true where the attorney is unable to pick and choose clients but must represent all who cannot afford to retain an attorney. Unfortunately, the sentiment is often shared by indigent defendants who believe that their chances of success are better with a private, assigned attorney (or, sometimes without an attorney) than with the public defender. Private attorneys for obvious reasons have nurtured this misconception and helped it grow.

One often hears that the basic weakness of the defender operation is its tendency to become institutionalized.⁴⁷ The danger does exist in a society as this one, where over 80 percent of those indicted for a major offense plead guilty.⁴⁸ An attorney whose professional life is totally involved with this class of people could become complacent and merely do everything by rote, but, to date, there is no evidence about the existing defender programs in the country which would bear this out.⁴⁹ The motivation that brings attorneys to the defender office in the first place along with the many changes in criminal law and the association with attorneys who are similarly motivated forestalls the onset of boredom and disillusionment. With firm leadership from the individual occupying the post of public defender, the original drive of staff attorneys can be reinforced.⁵⁰

In addition to the development of a professional defender operation with vast expertise in criminal law, a defender office enables a com-

⁴⁷ The warning has been given:

The tendency for legal institutions, particularly those concerned with the poor, to become large-scale organizations, extends not only to courts and tribunals but to agencies providing legal services as well. *Thus, the analogue to mass-production justice for the poor may be the development of mass-production techniques in the provision of legal services.* Carlin, Howard & Messinger, *Civil Justice and the Poor*, 1 LAW & SOC'Y REV. 9, 88 (1966) (emphasis added). See also 1 L. SILVERSTEIN, *supra* note 21, at 50-52.

⁴⁸ See L. SILVERSTEIN, *supra* note 14, at 21-25, 92-93. For Iowa, the 1962 survey showed that 70% pleaded guilty to a principle offense, and 4% pleaded guilty to a lesser offense. *Id.* at 92.

⁴⁹ *Contra*, N.Y. Times, July 9, 1968, at 78, col. 5, describing a suit by a young attorney claiming the New York Legal Aid Society violated his first amendment rights by discharging him for his comments critical of the Society's criminal law policies. The thrust of his comment was that the clients were being shuttled through the courts, allowed unnecessarily to plead guilty, not informed of what was happening to them, and were consciously excluded from jury trials for serious misdemeanors.

⁵⁰ See generally THE LEGAL AID BRIEFCASE, a monthly periodical devoted to the dissemination of information concerning legal aid programs and related topics.

munity to provide extensive legal services in proceedings for which the state has not authorized a legal fee to be paid. It is abundantly clear that *Gideon*⁵¹ was the first, not the last, step. Since *Gideon*, the Supreme Court has extended the right-to-counsel for indigents to lineups,⁵² police interrogation,⁵³ juvenile proceedings,⁵⁴ and probation revocation hearings.⁵⁵ State compliance with these requirements has been makeshift and spotty. Statutes passed around the time of *Gideon* authorizing compensation for attorneys appointed after an indictment to represent indigents at the trial stage do not extend compensation to pre-trial and post-trial proceedings.⁵⁶ The time gap between the arrest and the post-indictment proceedings, when there is no counsel in many communities for indigents, may be prolonged and result in a crucial loss of rights and evidence necessary to prepare a competent defense. The existence of a defender organization can close that gap in representation for it would be on call and available immediately after the arrest or at the preliminary court appearance.⁵⁷

C. Mixed Systems

Few communities have committed themselves to an absolute defender program,⁵⁸ choosing instead to experiment with a limited defender operation. The principal mixed system involves a sharing of

⁵¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963), *overruling*, *Betts v. Brady*, 316 U.S. 455 (1942).

⁵² *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

⁵³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁴ *In re Gault*, 387 U.S. 1 (1967).

⁵⁵ *Mempa v. Rhay*, 389 U.S. 128 (1967). A unanimous court, per Marshall, J., held that where petitioners had been convicted on pleas of guilty and placed on probation, a revocation of their probation and the imposition of sentence in proceedings where they were neither offered representation or represented by counsel was a violation of the fourteenth amendment due process. It is critical that counsel aid the petitioners in presenting their cases and preserving legal rights which might otherwise be lost at this stage.

⁵⁶ See NATIONAL DEFENDER CONFERENCE, *supra* note 16, at 77-96, for a list of state statutes concerning implementation of the right to counsel. Typical of the statutes are ARK. STAT. ANN. §§ 43-1203, 43-2415, 43-2416 (1964) (counsel assigned between filing of information and arraignment or at arraignment itself with exception of one county where counsel may be assigned at first appearance before magistrate); MASS. ANN. LAWS. ch. 276, § 37A (1966) (Counsel provided at arraignment or indictment information in noncapital cases and at first appearance before magistrate in capital cases).

⁵⁷ See FED. R. CRIM. P. 44, which requires that counsel, unless waived, should represent the indigent at every stage of the proceeding. This rule applies to both felonies and misdemeanors. A misdemeanor is distinguished from a petty offense in that the misdemeanor carries a penalty greater than \$500 and/or six months in jail. 18 U.S.C. § 1 (1966).

⁵⁸ See NATIONAL DEFENDER CONFERENCE, *supra* note 16, at 96.

assignments between the defender's office and private attorneys. Under this plan, the community is responding to the desires of the private bar and refraining from taking all indigent fees away from private attorneys. In Columbia, South Carolina, the defender's office handles most indigent defenses, but is supplemented by the court assignments to private attorneys.⁵⁹ Similarly, in San Diego, California, the defender office represents about half the indigent defendants, while the remainder of the cases is handled by the assignment of private attorneys.⁶⁰

A unique system has developed in Cleveland, and Toledo, Ohio, where judges and defender agencies have agreed that the defender offices will get every fourth and fifth assignment. These Ohio agencies are dependent upon a fair assignment of cases because, just like the private attorneys, they receive the sum authorized by statute for each case. They have been forced, in fact, to seek funds from other agencies to supplement their budgets. This is obviously a system which cannot function unless every judge assigns a fair share of the cases to the defender. Herein lie readily ascertainable flaws because the theoretically semi-independent agencies are totally dependent upon the continued good-will of the judges. The defender can receive a steady stream of hopeless cases and can be denied, at will, a fair share of those cases which are financially lucrative, such as those involving murder charges. Moreover, this arrangement provides too easy an opportunity for judges to relieve an attorney of a case when the indigent defendant appears recalcitrant or in any way loses the favor of his assigned counsel, who then wishes to withdraw from the case. Even though in direct contravention of the Canons of Professional Ethics,⁶¹ this type of withdrawal is not a rare occurrence. Nor is it unusual for the defender to be assigned the case the week it is to go to trial because the attorney who was initially assigned withdrew when he could not persuade the indigent to plead guilty.

For the community that is unwilling to invest in a permanent agency to represent the poor in a way comparable in size and capacity to the prosecutor's office, the mixed system does provide one major advantage. The courts do not hesitate to call on the defender offices for as-

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 14.

⁶¹ ABA CANON OF PROFESSIONAL ETHICS No. 44 provides in part:

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. . . . The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. . . . Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

This practice is also generally condemned as a frequent abuse of the assigned counsel system. See, e.g., PROVIDING DEFENSE SERVICES, *supra* note 23, at 49-50.

sistance in matters in which it is not authorized to pay an attorney. Consequently, the defender office in Toledo handles all preliminary hearings for indigents and does extensive work in misdemeanor cases.

The second mixed system is the least desirable of any program involving a defender operation because the defender does not receive assignments in any case in which a private attorney might be compensated. Under this system, the defender operates exclusively in juvenile cases, preliminary hearings for felonies, and represents some persons charged with misdemeanors. This is the defender program that has existed in Cincinnati, Ohio, as an adjunct of the Legal Aid Society of that city for more than two decades.

While better than not providing any assistance at all in these matters, a defender operation so limited is crippled. The operation is terribly understaffed and the individuals involved are harried and over-worked. Although their operations are usually limited to one court, they are faced with more cases than they can possibly handle, thereby foreclosing a meaningful involvement in any case. If an attempt is made to serve all defendants who desire and need their assistance, the defender can spend barely a minute or two on each case. Under these conditions the assistance of an attorney is of negligible value. Where the defender is barred from operating beyond the preliminary hearing in felony cases, there is virtually no communication with the attorney who is eventually assigned the case after the arraignment. A meaningful comparison can be made between the mixed systems functioning in Toledo and Cincinnati. In Toledo where the defender office shares the assignments with private attorneys there is great coordination between the defender office and the private bar, with the assigned attorney often requesting the file which was prepared by the defender for the preliminary hearing. In Cincinnati, however, where the defender's role ends with the preliminary hearing there is no such coordination. The varying conduct of the attorneys would indicate that in the first set-up, where the defender himself might be assigned the case at the arraignment, the private attorneys respect the preliminary work done by the defender and expect that they can obtain some assistance from his work.

The defender who is confined to the preliminary stages of all cases—usually in an urban municipal court that is lacking in both substance and decorum—becomes a part of that system of justice.⁶² He becomes

⁶² In a recent survey of municipal courts in Ohio, the author observed the following in the Cincinnati Municipal Court:

Here the prosecutor goaded the defendants when they stepped into the dock to give testimony and told the defendants and witnesses who spoke out of turn to 'shut up.' . . . The following morning another judge presided and dispensed with any modicum of dignity that might have existed within the courtroom the previous day. The judge seemed to encourage

accustomed to hurried justice and eventually conforms to it. His boredom and the slipping quality of his work is evidenced by the lack of confidence placed in this system by the private practitioners who are assigned the felony cases which he has begun but who very rarely think to call him for background information. This defender is not to blame, for he is a product of a system of justice whose success is measured by how little it must financially contribute to the defense of its poor.

II. WHEN IS LEGAL ASSISTANCE REQUIRED?

A person with adequate funds to finance his own defense retains an attorney as soon as possible after he has been arrested. This is not an example of conspicuous consumption; it is a matter of necessity. The individual arrested needs legal assistance to steer him through the unfamiliar surroundings, arrange bail and to keep track of the evidence while the events are still fresh in the recollection of witnesses. But what happens to the man who cannot afford to retain an attorney?

Just as Mr. Justice Harlan's separate concurring opinion in *Gideon*⁶³ provided the framework for the limitation of legal assistance to felonies, that opinion has been instrumental in determining when exactly in the proceedings the state must provide counsel to an indigent. The Harlan thinking easily resolved that problem by providing that the states are required to provide "the services of counsel at trial." The vast majority of states have adopted this limitation, offering no legal assistance, unless specifically required to do so by the Supreme Court, in any stage of the criminal proceeding prior to the indictment and subsequent arraignment in the trial court.⁶⁴

the prosecutor to hurl insults and jokes at the expense of defendants and witnesses. He repeatedly interrupted persons testifying and called many of the defendants 'bums' and 'liars.' Even worse, he frequently stopped a defendant early in testifying to announce, 'I don't care what you have to say. I'm not going to believe you anyway.' Katz, *supra* note 33, at 100.

⁶³ The relevant language follows:

The Court has come to recognize, in other words, that the mere existence of a *serious criminal charge* constituted in itself special circumstances requiring the *services of counsel at trial*. . . . [W]hether the rule should extend to *all* criminal cases need not now be decided. . . . I do not read our past decisions to suggest that . . . we automatically carry over an entire body of federal law and apply it in full sweep to the States. . . . *Gideon v. Wainwright*, 372 U.S. 335, 351-52 (1963) (emphasis added).

⁶⁴ But see N.Y. CODE CRIM. PROC. § 188 (1958) where the accused is afforded right to counsel when first appearing before a magistrate; HAWAII REV. LAWS § 705-5 (Supp. 1968) which provides:

Whenever any person charged or convicted of any felony is without sufficient means or resources to obtain counsel, the circuit court, a magistrate of the district court, may assign counsel for his defense or appeal. . . . A person subjected to the following shall be deemed included within the meaning of 'person charged or convicted of a felony' as used in this section:

. . . .

Convinced that the trial would be meaningless if the defendant has no protection during police interrogation and is unaware that he has the right to remain silent, the Court extended the right to counsel to cover this aspect of the criminal proceeding. As a result of the landmark and controversial decision in *Miranda v. Arizona*,⁶⁵ if the police wish to interrogate "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," the suspect must be informed of his right to remain silent, of his right to counsel, and that if he is unable to retain an attorney, legal assistance will be supplied to him. Furthermore, the Court placed the onus on the police to refrain from questioning the suspect if in any way he indicates that he chooses to remain silent or, even if he begins to answer their questions or make a statement, if he chooses to stop.⁶⁶

Miranda provided a dilemma for most communities. The states had adjusted to the *Gideon* requirement and provided for the appointment of counsel to represent indigent defendants at the trial stages. Most states, like Iowa, vest the power to appoint counsel in the trial court.⁶⁷ The interrogation generally takes place before the trial court, or any other court for that matter, that has assumed jurisdiction over the case. Few communities have come forward with any plan to fulfill this constitutional requirement.⁶⁸ Instead, the police, generally, have been forced to either forego questioning or devise methods to evade the *Miranda* requirements when the suspect chooses to exercise his rights.⁶⁹

(2) Proceedings for adverse amendment or revocation of probation where probation was granted upon conviction of a felony;

(3) *Preliminary hearings before a magistrate*;

(4) *Interrogation by law enforcement officers while in their custody*. . . .

Id. (emphasis added). See also note 84 *infra*.

⁶⁵ 384 U.S. 436, 477 (1966).

⁶⁶ The opinion of the Court stated the following:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at anytime prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . [A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. 384 U.S. at 473-74.

⁶⁷ See IOWA CODE § 775.4 (1966); Carlson, *supra* note 13, at 1076.

⁶⁸ But see NATIONAL DEFENDER CONFERENCE, *supra* note 16, at 7-8, discussing the services of the Defender Association of Philadelphia (DAP). When dealing with the representation of indigent defendants in criminal cases, DAP provides counsel in every phase of the case from interrogation to post-conviction counseling.

⁶⁹ Cf. Note, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. CHI. L. REV. 413, 431 (1969). The point is made that the express prohibition in *Miranda* of threats, trickery, and cajoling is confined to their use in obtaining a waiver — nothing is said of the tactics after the waiver is obtained. Thus no account is taken of multiple interrogation sessions, alternating "harsh" and "gentle" interrogators, the suspect's mental capacity and powers of resistance, questioning outside of the station house, or the coercive atmosphere of the whole process *per se*, consenting to waiver in order to "please" the police.

Even if counsel is provided in the police station prior to any interrogation, it is rarely the result of a formal court appointment. Usually the attorney is responding to a request from the suspect, police, bar association, or judge who has arranged to provide the attorneys when requested to do so by the police. The attorney is not compensated for this activity which is rarely an arrangement that continues through the entire criminal proceeding.

Whether counsel is provided in the police station or not, it is usually not provided later for the preliminary appearance and hearing and through the indictment phase of the case. Just one month after *Gideon* the Supreme Court extended the right to counsel to a preliminary hearing.

In *White v. Maryland*,⁷⁰ the defendant pleaded guilty to a murder charge at a preliminary hearing without being represented by counsel. Although the defendant's plea was changed to not guilty, the original plea was entered as evidence against him at the trial. The Court stated that the preliminary hearing became critical, thus requiring the appointment of counsel because the defendant was required to enter a plea, and the plea he entered was guilty. The Court quoted from an earlier decision saying, "[W]e do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.'"⁷¹ The tone of the *White* opinion and the fact that it was handed down immediately after the *Gideon* decision would indicate the Court's intent to extend legal assistance to all eligible defendants from the first court appearance. The states, however, have concentrated on that aspect of the *White* decision where the Court indicated that the preliminary hearing became a critical stage because the defendant pleaded guilty.

In order to forestall the preliminary appearance and hearing from becoming "critical" stages, thus requiring the appointment of counsel, a plea of not guilty is entered on the defendant's behalf.⁷² Most states have followed this approach rather than providing for appointment of counsel at this stage.⁷³ The emphasis is on form and not substance, and

⁷⁰ 373 U.S. 59 (1963).

⁷¹ 373 U.S. at 60, quoting *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

⁷² As in the *White* case, discussed *supra* note 1, many courts where preliminary hearings are held do not have final jurisdiction over the case. Therefore, if a man appears before a justice of the peace or municipal court for the preliminary hearing, the judge is forced to enter a plea of not guilty on the defendant's behalf. Accord, *State v. Kulish*, 260 Iowa 133, 148 N.W.2d 428 (1967) (plea of guilty before justice of the peace disallowed).

⁷³ IOWA CODE § 777.12 (1966) provides that a plea of guilty can only be made in an open court following an indictment. In *State v. Kulish*, 260 Iowa 133, 143, 148 N.W.2d 428, 432 (1967) the court said:

keeping the case from becoming "critical" takes on foremost importance. The actual needs of the defendant, which go to the heart of the Sixth Amendment right, seem to be of little concern as the courts focus on fulfilling formal requirements.

It cannot be disputed that in principle *any* step of a proceeding which may result in depriving an individual of his freedom for a substantial period of time is a critical stage. Moreover, each of these safeguard procedures is constitutionally vital to the American scheme of justice as it is presently constituted. In essence, however, many are abolished as far as the poor man is concerned because only the accused sufficiently affluent to retain the services of an attorney at the earlier stages is able to make full use of the safeguards. The primary function of the preliminary proceedings, of course, is to determine whether the state has sufficient evidence to pass a cursory examination to further inconvenience the accused by holding him for the grand jury and subjecting him to the publicity which is attendant upon being accused of a serious crime.⁷⁴ The probable cause test is not at all comparable to the state's burden of proving guilt beyond a reasonable doubt,⁷⁵ but it does serve as one of the protections devised to shield a citizen from arbitrary interference with his freedom by government officials.

Moreover, the preliminary hearing has become in recent years a valuable tool for most defense attorneys.⁷⁶ Serving as a discovery device, it enables the defense to learn the names of the state's witnesses, at least those who are called upon to testify at the preliminary hearing. But of greater importance, it provides a key to the weaknesses of the prosecution's case and furthermore presents an opportunity for the defense attorney to cross-examine prospective witnesses. The record made at the preliminary hearing acts to check the consistency of these witnesses and, at the trial itself, to refresh witnesses' memories of the actual event if they have dimmed through time to the detriment of the defendant. These "fringe benefits" in the preliminary hearing are most instrumental to an effective defense, yet in the majority of American communities they are denied to poor defendants

In that proceeding [a plea of guilty before a justice of the peace at a preliminary hearing] anything beyond determination of whether defendant should be bound over to await action of the grand jury, and fixing bond, would be in excess of the Justice's jurisdiction.

⁷⁴ Only three states, Delaware, Maryland, and Vermont, have no provision whatever for a preliminary hearing. For a history of the origins of the preliminary hearing, especially in connection with the conflict of a free press, see Geirs, *Preliminary Hearings and the Press*, 8 U.C.L.A. L. Rev. 397 (1961).

⁷⁵ Cf. IOWA CODE § 761.18 (1966) where the magistrate must find "sufficient reason" for believing the defendant's guilt.

⁷⁶ See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279.

because they are denied legal assistance at this stage.⁷⁷ Certainly, these defendants need not waive the preliminary hearing and they may question the state's witnesses. But being unaware of the importance of the preliminary proceeding and being untrained in the law and inexperienced in cross-examination, the indigent defendant who appears without counsel at the hearing sees and hears little that will help his own defense.

One reason usually advanced for denying the assistance of counsel at this stage of criminal proceedings is the traditional purpose of the preliminary hearing. The preliminary hearing was incorporated into the criminal process solely to force the state prior to prolonged inconvenience to the accused to show that it had good cause to subject him to further proceedings. The defendant may remain mute, nothing is required of him and the full burden falls upon the state to show probable cause. This reasoning, however, ignores the evolutionary changes that have transformed the preliminary hearing. If it is a valuable tool for discovery for the affluent defendant who has counsel, to deny its value to the defendant without funds makes a mockery of the claim of equal justice.⁷⁸ Differentiating between the preliminary hearing that becomes critical is not an adequate distinction either, nor can the proceeding rationally be distinguished from the "criminal prosecution" any more than events in the police station can be distinguished.⁷⁹

In the absence of a federal dictate or encouragement from the state, most communities continue to restrict legal assistance to the period after the arraignment in the general trial court.⁸⁰ Any deviation from

⁷⁷ A worse situation may still exist, as in the *White* case, *supra* note 1, where the accused will waive a statutory maximum time limit between the arrest and the preliminary hearing. Thus, the indigent defendant will be at the whim of the state, without counsel, without bail, and without any procedural safeguards.

⁷⁸ Other disadvantages the unrepresented defendant encounters at the preliminary hearing have been listed:

First, he does not know whether to ask for the hearing or to waive it. If the hearing is held, he does not know how to cross-examine the states' witnesses, or whether to testify himself. He does not know the requisite legal elements of the offense with which he is charged, nor of the lesser related offenses, so he is unable to discuss intelligently with the prosecutor possible reduction or dismissal of the charges. Moreover, it is possible, especially if the committing magistrate is untrained in the law, that the defendant will be bound over for the grand jury on insufficient evidence or that political considerations will affect his decision. 1 L. SILVERSTEIN, *supra* note 21, at 83-86.

⁷⁹ U.S. CONST. amend. VI. states: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." (emphasis added).

⁸⁰ In 3 L. SILVERSTEIN, *supra* note 21, at 588-89, the author prepared a table of the procedure for the appointment of counsel in Ohio in felony cases. He found that most of the counties appointed counsel at or after arraignment. In Cuyahoga county, the author reported that counsel was first offered after the arraignment. The defendant is brought before a judge and asked to plead. A guilty plea is not

this raises financial problems for the community and requires ingenuity on someone's part. Because of a lack of support from the bench, a unified legal community on this matter is uncommon. Perhaps the proper accent should be not on the commonplace—here the denial of legal assistance—but on those communities that have extended legal aid to defendants prior to that time required by the Constitution of the United States.

Generally, there are three ways to provide counsel for an indigent defendant at a preliminary hearing. The existence in a community of a public or private defender organization creates the easiest solution. Where there is a defender, he can handle all preliminary hearings, whether or not he receives assignments at the trial stage. Where the defender operates on a predetermined budget, a set sum can be appropriated for this task and case by case compensation need not be a concern. As related earlier, however, where the defender is unable to pursue any case beyond the preliminary stages, his interest is limited. Practicing attorneys have voiced objections to the handling of preliminary hearings by defender offices. Defenders, the attorneys complain, too often waive the preliminary hearing, a practice looked upon by the majority of attorneys as inadequate counsel. Trial lawyers also find serious fault with the defender office that fails even to prepare a file on the case and then fails to transmit the information obtained during the preliminary stages of the case. The regrettable condition of having one attorney at the preliminary hearing and another appointed at the arraignment for the purpose of seeing the case through to its conclusion is in itself detrimental to the defendant's interest. But if no effort is made to pass along what was learned to the assigned attorney—or if the appointed attorney makes only a half-hearted attempt to learn what transpired—the case, hence, the client, will suffer.

A second approach to providing counsel at the preliminary hearing, the assignment of a private attorney by the municipal or magistrate's court without coordination of the assignment with the trial court, suffers from the same disabilities described in the initial solution of this problem. Whether the attorney handling the preliminary stages of a criminal case is from a defender organization or a privately assigned attorney, if he is not going to pursue the case to its con-

usually accepted until after counsel has been appointed although a written waiver is sometimes accepted. If the defendant answers that he is unable to hire counsel, the court appoints one. In other counties it was reported that guilty pleas were accepted without counsel or accepted when an appointed lawyer who happened to be in the courtroom would counsel the defendant about the plea. It would appear the courts of Ohio as well as the police appear to be more concerned with pretending to follow Supreme Court rulings than in guarding the rights that the Court would have them do.

clusion in the trial court, there is in addition to the attorney's limited interest, a severe limitation on the ability to create an attorney-client relationship. Moreover, the appointment of a private attorney only for this stage of the proceedings creates problems of compensation. Few state statutes authorize the compensation of attorneys for any work done prior to the arraignment, thus the fee will have to be arranged by the municipality, but more likely the attorney will be asked to donate his services.

Obviously the best way to bridge the gap in continuity is to have the same attorney who will have the ultimate responsibility for the trial handle the case in its preliminary stages. This will enable the attorney and the accused to establish a viable working relationship and permit the attorney to begin preparing the defense when the facts are freshest. The approach is best facilitated by a working arrangement established between the municipal court where the preliminary hearing is to take place and the trial court which will have the ultimate jurisdiction in the case and has statutory authority to appoint counsel after an indictment is returned. In some cities it has taken the form of the trial court being notified and appointing counsel, who is then formally appointed once again by the trial court after the indictment. The alternative arrangement is for the municipal court to appoint counsel and the trial court to reappoint the same attorney. It is reported that the latter arrangement exists in Des Moines, Iowa, where the Polk County District Court will appoint the same attorney who represented the accused in the municipal court and compensate him for the earlier representation.⁸¹

Compensation, or rather the lack of it, has proven the one drawback to the early appointment of counsel. Problems naturally occur because the municipal court has no way of paying for the services rendered in its own court. If the case is terminated at an early stage prior to arraignment and thus before a formal appointment of counsel as provided by statute, the attorney is not compensated. In such an instance, however, most courts have informally provided that the attorney's name remains at the top of the appointment list and will be chosen to represent the next indigent defendant, at which time his compensation will reflect the work done in the previous case. Few communities today have appropriated funds to enable their municipal courts to compensate attorneys for the work done on the appointments in that court. It is fairly universal, for compensation to be deferred and to be paid by the trial court, creating the unusual situation where the attorney is compensated only if he is unsuccessful in the preliminary stages and fails to have the charges dismissed.

⁸¹ See Carlson, *supra* note 13, at 1080.

While there may be deplorable faults in the system which utilizes one attorney in the preliminary stages of a case and a different attorney at the trial, it is far preferable to the nonsystem which allows the defendant no representation until after the arraignment. Similarly, compensation problems caused by the necessity of appointments by two courts are easily surmountable and seem small indeed when the dilemma created for our concept of equal justice is considered if no counsel is provided until the arraignment.

In those communities—the vast majority—where no legal assistance is provided during the preliminary stages of the case, the inequities are even further complicated by the bail structure. Depending upon court calendars and when the grand jury is in session, the time lapse between the arrest and appointment of counsel can be several months or longer. This extended lapse of time highlights and complicates the unavailability of legal assistance to the indigent during this period. Because of a lack of bail, the accused is incarcerated while waiting for the wheels of justice to start grinding. Throughout this period he is without the assistance of an attorney to speed state officials along and to begin preliminary preparation of the case. Few communities have adopted release on recognizance programs patterned after the Vera Foundation system which permits release without bail depending upon the stability of the accused's roots in the community.⁸² If he is without the aid of counsel, the accused, without the requisite training to know what he is looking for, must undertake the initial preparation of his defense. But, in the likelihood that he is incarcerated, he is unable to keep tabs on witnesses and speak to people who may have witnessed the act or know something about it. At every turn, then, the mechanics of the system of justice operate to the detriment of the indigent. He does not have counsel so he must develop his case as best he can by himself. But even then, what little he could do is forestalled because he is in jail.

Moreover the period spent in jail—for Paul White in Youngstown⁸³ and all other prisoners—is dead time which does not count towards the sentence that may be forthcoming nor is the defendant able to earn money to amass funds to retain legal counsel, let alone to support his family. The loss of income depletes all funds which a family may have and totally destroys the accused's ability to finance even part of his own defense. Furthermore, the likelihood of adding the accused's family to the welfare rolls is increased.

Thus few states have moved decisively to extend legal assistance to the indigent prior to the arraignment and indictment.⁸⁴ It becomes

⁸² See Ares, Rankin & Sturz, *supra* note 4.

⁸³ See note 1 & accompanying text *supra*.

⁸⁴ For those states which have acted, see HAWAII REV. LAWS § 705-5 (Supp. 1968);

clear, nearly seven years after that momentous decision, that *Gideon* was not sufficiently far reaching. The inequities in the administration of criminal justice occasioned by the extent of the accused's wealth remain great. The principal evidence of that inequity is that in a majority of communities the lawyer assigned to represent the indigent defendant enters the case closer to its conclusion than its inception.

III. THE QUALITY AND NATURE OF THE LEGAL ASSISTANCE

A. An Overview

Prior to any assessment of the legal assistance presently being offered to indigents, recognition must be made of the long history of uncompensated service that the legal profession has bestowed to persons who are unable to afford it. Having long been a guide within the profession, though rarely acknowledged or even realized by the general public, is the premise that every member of the community no matter how lowly is entitled to legal assistance when he needs it. Before government's entrance into this area, these services were being donated by members of the legal community. Consonant with that objective has been the historic tradition that the assistance must be available no matter how unpopular the cause and no matter how outraged the general community may be at the lawyer who comes forward to provide the service. That tradition, which began with Andrew Hamilton's classic defense of John Peter Zenger⁸⁵ in spite of the maneuverings of the British colonial authorities, has carried into the twentieth century. As individuals, lawyers continue to devote extensive time to non-fee-paying clients who seek them out.

With the advent of government subsidies for legal assistance and the Supreme Court rulings which place the onus for providing this assistance on the states, the legal community, while continuing to devote itself as individuals, has failed in the main to come forward and assess the quality of the representation being provided by its own members.

MD. SUP. CT. RULE 719 (B) (1) (Supp. 1968) (at any stage of the proceeding if accused appears in court without counsel and if maximum possible penalty will be death or imprisonment for 6 months or a fine of \$500 or both); MINN. STAT. ANN. § 611.14 (Supp. 1967); N.J. STAT. ANN. §§ 158a-1 to 15AA-22 (Supp. 1967); N.M. STAT. ANN. § 41-21-3 (Supp. 1969) (right to counsel attaches at earliest time when a person providing his own counsel would be entitled to be represented by an attorney); N.Y. CODE CRIM. PROC. § 188 (1958); N.C. GEN. STAT. § 15-4.1 (1965) (counsel appointed at preliminary examination before defendant is required to plead in felony cases); UTAH CODE ANN. § 77-64-2 (Supp. 1967) (assigned counsel shall represent each indigent person who is under arrest for or charged with a crime in which confinement for more than 6 months could result); WYO. R. CR. P. 6. 7(a) (1969).

⁸⁵ See 1 S. MORISON & H. COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 122 (5th ed. 1962).

Instead, the task has been left to the courts to supervise the work of counsel, a task that has largely been left undone.

An assessment of the quality of representation accorded indigent defendants is extremely difficult. For every instance of inadequate counsel that is uncovered there are several examples that may be cited where the attorney performed more than adequately, but the latter are rarely recorded. That is the way it should be. The profession must not concentrate on its achievements but, instead, must seek out its weaknesses so that they may be corrected. For in this age when the nation is faced with so many examples of disillusionment by the young and dispossessed, we can ill afford to tolerate weaknesses in the lifeline of its system of government: the administration of justice.

One of the phenomena of the past decade is the reluctance of trial judges to accept pleas of guilty without the accused's first consulting with an attorney, whether he wants to or not. This solicitude is not so much for the accused's benefit but is a means for the court to protect itself from subsequent claims from the penitentiary that the waiver of counsel was secured from the defendant without an adequate understanding of his rights.⁸⁶ Though not apparent on the face of the record, those appointments of counsel are often made minutes before the defendant pleads guilty, after having "thoroughly" discussed the case, facts and ramifications of such a plea with counsel⁸⁷ Some courts will still accept pleas from unrepresented defendants, but they are more on the decline now than ever before. The irony of this type of assignment is that in many states if the defendant is placed on probation, repayment by the defendant to the county of the attorney's

⁸⁶ See D. NEWMAN, *CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3-7 (1966).

⁸⁷ There has been some indication that professional correctional leaders believe that this kind of early representation would give the offender a greater sense of fairness enabling rehabilitary treatment to be of greater effect, a point usually overlooked.

James V. Bennett is quoted from 1 J. BENNETT, *OF PRISONS AND JUSTICE* (1964) on this exact point:

The defendant who is unable to obtain competent counsel is swept rapidly through the machinery of our courts and begins his imprisonment in a bitter and uncompromising frame of mind. Any feeling he might have had that society is against him is reinforced; and he fights back in those ways that remain available to him. He declines to improve his education in the prison school, he refuses to undertake vocational training, and he is unapproachable to his counselors. Indeed, he may become violent to his fellow prisoners and his keepers and even psychotic after brooding night after night in the loneliness of his cell over the injustice that he is convinced has been inflicted upon him

In my opinion, the readiness of prisoners to become rehabilitated would be considerably enhanced if they emerged from their court experience satisfied that their side of the story had been fully, energetically, and capably presented to the court. *Id.* at 364-65.

fee is a condition of that probation.⁸⁸ This type of assignment is not a taxing nor a time consuming way for the recipient attorney to earn a fee.

While these types of appointments are fairly common, they are by no means the rule. When an attorney accepts an appointment, he may be involving himself in weeks of preparation and an extended period of time in court. Unfortunately, many attorneys receiving appointments are not willing to undertake such a commitment. Here the appointment system breaks down.

Any criticism directed at the attorneys who are appointed to represent indigent defendants must be tempered by a realization of what the attorney finds when he becomes involved. Because of the lapse of time between the arrest and the arraignment, the attorney knows nothing of the case until his appointment, which in some instances is several months after the defendant was arrested and first brought before a court. The chief disadvantage is the staleness of a case that has been dormant for several months. Most lawyers feel that something is lost by not "living" with a case for a while, thinking about the witnesses, mulling over the defense possibilities, and obtaining a feel for the subject-matter. The best time to investigate a case is as close to the commission of the act as possible; this is denied to the attorney who is not appointed until after the arraignment. It is difficult for the layman to realize how elusive witnesses may be, especially when they believe it is in their interest not to get involved. Noninvolvement, which seems to be a creed of modern America, is a constant hindrance to all lawyers, but it mushrooms in importance when an attorney's first contact with prospective witnesses is months after the altercation when the witnesses are beginning to feel secure that they will not be implicated or inconvenienced. This problem, not shared by the prosecution which has the advantage of the initial statements made by prospective witnesses to the police, is most difficult in the black ghettos where transiency is the greatest and locating someone the hardest.⁸⁹

Anonymity becomes one of the strongest desires within the ghetto whenever anyone associated with the police and courts is looking for someone there, where a distrust of the entire "establishment" prevails.

⁸⁸ See, e.g., N.M. STAT. ANN. § 41-22-7 (Supp. 1969); PA. STAT. tit. 19, § 1051 (1964); TEXAS CODE CRIM. PROC. ANN. art. 42.12 (1968).

⁸⁹ This seems to be the case, because the policeman in the ghetto is a symbol not only of law, but of the entire system of law enforcement and criminal justice. As such he becomes the tangible target for grievances against the shortcomings throughout the system: against assembly-line justice in teeming lower courts, against wide disparities in sentences, against antiquated correctional facilities, and against the basic inequities imposed by the system on the poor — to whom, for example, the option of bail means only jail. THE U.S. NAT'L ADVISORY COMM. ON CIVIL DISORDERS, *supra* note 39, at 157.

Most ghetto residents are reluctant to distinguish the white defense attorney from the white plainclothesman or white process server, and here the cost to the person who becomes involved may be so great as to outweigh any advantage that may accrue to the defendant. Unless there has been a close relationship between the defendant and the individual sought, the latter is unlikely to come forward. A change has been noted in the past year or two, though, in this regard as young, black militants who share a community identity and a feeling for unity have come forward on occasion to assist defense attorneys seeking to locate witnesses. On the whole, however, the problem remains. The casual acquaintance who was a drinking partner the night of an alleged commission of a crime too often slips into the shadows of the ghetto.

Building an attorney-client relationship is also more difficult after the accused has remained in jail for a prolonged period of time without any assistance. To begin with, appointed attorneys are not very popular among the inhabitants of jails. Tales of raw deals perpetrated by court-appointed attorneys, justified or not, are circulated among the men awaiting trial. These tales create difficult barriers even before the attorney is appointed and appears on the scene. The rapport that is established when a client privately retains an attorney and the confidence that client has in his choice is absent when the court appoints the attorney. In fact, deep distrust often exists on the part of the defendant because of the very nature of the appointment system where the lawyer is contacted by the judge. Few indigents realize that this is merely a *modus operandi* which does not make the attorney obligated to the appointing judge. The longer the relationship and the more time an attorney spends with his client, the greater the confidence the client will develop for his lawyer and the more extensive will be the communication between the two. Lack of candor on the part of the defendant-client will only further hinder the already late preparation of an effective defense. This estrangement is mitigated in some communities where, if the indigent defendant requests a specific attorney, the court would attempt to honor that request by appointing the attorney. This is most common in counties with small populations, where the number of appointments each year is limited and the likelihood greater that defendants will personally know, or at least have heard of, some attorneys.

B. How the Attorneys See Themselves

At the beginning of this section, there was mention of how difficult it is to assess the quality of representation accorded to indigent defendants by appointed attorneys. The following assessment is reported only in terms of how attorneys see themselves and their colleagues who represent indigents. The opinions were gathered by the author during

a study conducted for the National Defender Project on poverty and criminal justice in Ohio.⁹⁰ Consequently, the opinions recorded are those of Ohio attorneys respecting the quality of services provided by other Ohio attorneys. While such an assessment contains many different views of the quality of representation provided, a surprisingly large majority feel that it is largely inadequate and uniformly inferior to the services provided for paying clients.

First, a distinction must be made again between the young attorney recently out of law school who receives a sizable proportion of indigent cases and the older attorney who seeks the appointments because he needs them. In the urban areas the greater percentage of appointments goes to the latter group. The young attorneys, who it is assumed have the time to work on the case, generally do superb jobs. The attitude of the older attorneys towards this group is not very favorable mainly because the younger attorney's conduct in the course of a case is so different from what has come to be expected of an attorney representing an indigent defendant. In short, they are ready to scrap for their client and exert the same energy that they would for a paying client.

It is not at all unusual for an appointed attorney to ignore an indigent client and to postpone the initial contact as long as possible.⁹¹ In the summer of 1967, a letter came to the Cleveland office of the American Civil Liberties Union from an individual being held in jail awaiting trial on a felony charge. His complaint was that he had been in jail several months and had not been appointed counsel. A simple check of the record disclosed that indeed an attorney had been appointed over a month before but had not even made that fact known to the accused. Another example that arose in a complaint with the ACLU involves an appointed counsel, who according to the statement of his indigent client, withdrew from the case because he did not want to be involved when the client claimed that he had been beaten by the police. The second counsel was not appointed for five months, and that was only one week before the scheduled date of trial.

Attorneys in the large urban areas contend that indigent defendants are apt to plead guilty in greater numbers to felony charges than those represented by privately retained counsel.⁹² If this is true and dis-

⁹⁰ See NATIONAL DEFENDER CONFERENCE, *supra* note 16, at 44-54.

⁹¹ In *White v. Ragen*, 324 U.S. 760 (1945), this kind of action was held to be violative of the right to effective aid per *Powell v. Alabama* when an attorney refused to confer with the accused prior to trial, failed to call witnesses, and pleaded the accused guilty.

⁹² This contention is not altogether unsupportable by fact. However, in a representative sampling of 300 counties in the country, a 1962 survey found that varying local conditions made it difficult to state any broad, conclusive generaliza-

proportionate numbers of poor defendants are pleading guilty to felony charges in spite of the appointment of counsel, the Supreme Court's mandate that equal justice not be decided by a person's wealth is still an illusion. The principal reason for the discrepancy is, in fact, financial, according to the attorneys.⁹³ In the urban areas compensation for a plea of guilty in a non-homicide case ranges anywhere from \$50 to \$140 and for a trial from \$100 to \$300.⁹⁴ The feeling among the members of the bar is that these fee schedules are unrealistic and unfair. Going to trial is always a money-losing proposition, while accepting the fee for a plea of guilty—while certainly not greatly rewarding—is to many attorneys a fair fee for a couple hours of work. It is incredible how some attorneys have come to depend financially upon anywhere from six to fifteen appointments a year and to actively seek them out. In addition, to the many attorneys who take appointments as a public service and a court ingratiating gesture, the fees are entirely too inadequate for them to justify a great expenditure of time. In many instances judges are neither aware nor sympathetic to complaints about inadequate fees. Reports of such were greeted by some judges with amazement because of the apparent desire of the attorneys to secure the appointments.

In addition to the financial deficiencies, there is another explanation for the inadequacy of much of the court-provided legal assistance. Many of these attorneys believe that they are operating just the way the judges want them to. These lawyers maintain that judges are pleased with their present methods of handling cases because it significantly limits the number of trials. They add that they are dependent upon the court for the appointments and for approval of their fees and future appointments. Frequently they point to specific attorneys in their communities who in their zealotry to provide adequate representation go to trial, raise all constitutional objections, and are accused of clogging the courts. Rarely do these attorneys receive subsequent appointments, a sign that is not missed by those who wish to remain on the appointment lists. Some prestigious lawyers, not engaged in appointment-seeking and extremely critical of both lawyers who are and the entire system which nurtures this type practice, claim that appointed attorneys are so subservient to the judges and what they believe the judge wants out of them that they will purposely avoid raising particularly challenging points that might antagonize the judge.

tion. See L. SILVERSTEIN, *supra* note 14, at 54-55, for tables comparing a few of the sample counties.

⁹³ See NATIONAL DEFENDER CONFERENCE, *supra* note 16, at 45.

⁹⁴ See THE MINIMUM FEE SCHEDULE OF THE CUYAHOGA COUNTY BAR ASS'N, *supra* note 28; THE IOWA STATE BAR ASS'N, ADVISORY SCHEDULE OF MINIMUM FEES, *supra* note 18.

The full effect of the number of guilty pleas is compounded by the relative positions of the prosecutor and appointed attorney when it comes to plea bargaining. Plea bargaining, an accepted method of disposing of cases, is workable when the parties involved—prosecutor and attorney—operate from a position of good faith. The attorney who has been retained and is seeking to obtain the best deal possible for his client will not tremble at the thought of going to trial if an acceptable deal does not materialize. This too is the situation with attorneys who do not seek appointments but accept them only at the behest of the courts. The willingness of those attorneys to go to trial generally will result in arriving at an arrangement, if one is at all possible, that is equitable from both society's and the defendant's points of view.

Such is not the case when the defendant's attorney is appointed by the court, has sought the appointment for the income, and will not go to trial. The adversary system breaks down under these conditions because it is predicated on each side's bargaining in the interest of his client; here the appointed attorney is bargaining in his own interest and the client's best interests are incidental. The prosecutor need not concern himself with choosing between a sure conviction, albeit to a lesser offense or with a recommendation for probation, and the uncertainties of a trial and the time which would be consumed. He knows that, come what may, the attorney will not go to trial. There is, in fact, no real bargaining because the prosecutor can offer a deal with full knowledge that if he persists that deal will be accepted. The financial consideration becomes even greater where there is no difference in the fees whether there is a trial or a guilty plea. In some localities, the attorney will receive the identical fee, whether he pleads the defendant guilty after a couple of hours (or less) of his time or whether he spends a week or more in trial.⁹⁵

The indigent defendant is the pawn in this encounter and rarely does he refuse to accept any deal worked out by his attorney. First, he is not aware of the realities and the vast number of alternatives that can be arranged. Secondly, he is almost totally within the power of the attorney who can sell him just about any set of facts or chamber of horrors that he wishes. The typical defendant has uppermost in his mind the maximum time set by statute that he faces if convicted of the charge. Any change to the better will generally be greeted with relief. Occasionally a defendant rebels at the deal arranged by his counsel or refuses any offered deal regardless of how much to his benefit it may be. In that instance a plea of guilty is out of the question and a trial inevitable. Unless the attorney can devise another way out, he

⁹⁵ In those communities the compensation is determined solely by the nature of the charge rather than a combination of the nature of the charge and the amount of work put in by the attorney.

will be compelled to go to trial. That alternative route does exist when counsel is released from his commitment by the judge, and it is made easier when the judge does not demand an explanation for the attorney's motion to withdraw from the case. A second attorney may often be appointed at this stage—generally a week or so before the scheduled trial date—to find that there has been no appreciable preparation done in anticipation of the trial, to be confronted with an irascible and disgruntled client, and a seemingly hopeless set of facts. The defender office in Cleveland seems to come in for more than its fair share of these cases.

This brand of justice at the expense of the defendant is a rarity in the federal courts. Inadequate fees being no longer a problem,⁹⁶ the courts are able to choose attorneys freely. In the state trial courts, certification of the attorney's fee is almost automatic, while it is not in the federal courts. Federal judges will not hesitate to refuse to certify an attorney's bill if they believe he did not adequately represent the interests of his client or if he was insistent upon pleading him guilty regardless of the merits.⁹⁷

Under the conditions prevalent in state courts the equalizer that the assistance of counsel is expected to be is unworkable. As long as the courts use their appointment power as a political patronage lever or, worse yet, use it to subsidize struggling members of the bar, the appointment of counsel for indigent defendants is not serving its primary purpose. Toleration by these courts of the practices involved in ignoring the defendant, failing to engage in any preparation or investigation of the case, and imposing deals worked out with prosecutors regardless of the best interests of the defendant, indicate that the judges are either unwilling to or not capable of policing the bar in these endeavors.

⁹⁶ 18 U.S.C. § 3006A(d) (1964) provides for payment for representation:

An attorney . . . shall, at the conclusion of representation or any segment thereof, be compensated at a rate not exceeding \$15 per hour for time expended in court or before a United States' commissioner, and \$10 per hour for time reasonably expended out of the court, and shall be reimbursed for expenses reasonably incurred For representation of a defendant before the United States' Commissioner and the district court, the compensation to be paid to an attorney . . . shall not exceed \$500 in a case which one or more felonies are charged, and \$350 in a case in which only misdemeanors are charged. In extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation For representation of a defendant in an appellate court, the compensation to be paid . . . shall in no event exceed \$500 in a felony case and \$300 in a case involving only misdemeanors.

⁹⁷ A difficult question arises if the attorney's bill is not certified and then the defendant appeals on the grounds that he did not receive effective counsel. Indications are that the state courts may take a narrower line than the federal courts. See *State v. Wesson*, 260 Iowa 331, 339, 149 N.W.2d 190, 195 (1967) (only in extreme cases where it is shown that the trial as a whole was a farce and a mockery of justice will a conviction be set aside because of inadequacy of counsel).

Moreover, each lawyer discussing these practices made it quite clear that the judges are well aware of the existence of these failings and all, in fact, stated that the shoddy practices exist with the acquiescence of the courts who want as few trials as possible.

IV. REORGANIZATION OF THE SYSTEM OF PROVIDING LEGAL ASSISTANCE: A PROPOSAL FOR REFORM

A. Necessary Items of Reform

The money presently being spent by local communities for legal assistance for indigent defendants is not money well spent. In light of the inadequacy of the fees, however, this society is getting exactly what it is paying for. It is not meeting its obligations to insure equal justice to all its citizens.

Rather than contracting, the state's obligation to provide legal assistance is going to expand. Pointing the way is *In re Gault*⁹⁸ which provides legal assistance for minors appearing in juvenile court. The Court has been slowly pursuing this steady course in order to see its results on the state courts and to permit the states to perpare for greater legal services.⁹⁹ Albeit slow, the direction is set and there is no turning away from it. Devious attempts to bypass the requirements will not be tolerated much longer, and there can be little doubt that the requirement of counsel will be extended to include all proceedings from arrest to parole. Competency of counsel, one of the nagging immeasurables, also becomes relevant at this point in light of hesitant stabs into this question by appellate courts.¹⁰⁰ Society must translate the glimmer of hope that the constitutional guarantee of counsel holds out into something meaningful. The integrity of the system and its

⁹⁸ 387 U.S. 1 (1967).

⁹⁹ See notes 52-56 *supra*.

¹⁰⁰ Courts have been reluctant to grant new trials on the basis of ineffective counsel because this seemed not only to be an implicit censure of the trial court but also an invitation to multitudinous problems involving what is "inadequate counsel." Some courts, however, have been willing to venture into the field. For example, Judge Coleman, in *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965), stated that an attorney "[c]annot stand still and do nothing. That indeed might be the best evidence of incompetency, or infidelity, or ineffectiveness, or all three." *Id.* at 706. *But see* *Edwards v. United States*, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958). *Edwards*, a narcotics addict having severe withdrawal symptoms, was pleaded guilty by his court-appointed attorney. The court held that ineffective counsel was immaterial in barring the confession except when bearing on voluntariness and understanding. *Id.* at 709. Judge Bazelon delivered a strong dissent stating that it was pertinent for the court to know whether *Edwards'* attorney knew the circumstances of the confession. The attorney should have consulted *Edwards*. *Id.* at 710-11.

ability to function—reasonably equal adversaries bringing the facts before the trier—is dependent upon the adequacy of counsel.

If equalizing the state and the indigent defendant is to be the goal, the weaknesses inherent in the appointment of private attorneys become apparent: attorneys with little experience in the criminal law are being thrust into a case without the required complementary assistance and are having to compete with the prosecutor's office which is staffed by attorneys whose work is exclusively criminal law and which may call upon the assistance of police investigators and scientific laboratories.

Ideally, to equalize the existing appointment system with the facilities that the state has would mean the following changes: 1) appointments made only to that segment of the practicing bar which has had extensive criminal experience; 2) compensation determined solely on an hourly basis comparable to what the attorney charges private clients, and 3) all of the necessary supplemental services and experts required to prepare an effective defense provided by the state.¹⁰¹ These changes will not be made. First of all, there are not enough attorneys in most urban areas who fit the description of having extensive criminal experience.¹⁰² Appointments would be so concentrated on a few attorneys (who would then not have time for a private practice) that informally they would become public defenders. It is doubtful that these practitioners, if successful in private practice, would be willing in essence to abandon that practice for almost full-time public service work.

Within the existing structure, then, the only alternative economically and constitutionally is to adopt the public defender system as the means for representing all indigent defendants.

The adoption of a full-fledged public defender system will go a long way toward correcting the inadequacies presently existing in the nation's criminal justice system. It would enable expansion of legal assistance to the initial stages of every felony prosecution and perhaps herald expansion into the representation of misdemeanants. The public defender institution, however, should not be viewed as an end but as

¹⁰¹ On the federal level, this has been realized in the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e) (1964):

Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in this case may request them in an *ex parte* application. Upon finding after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services on behalf of the defendant The compensation to be paid to a person for such service rendered by him . . . shall not exceed \$300, exclusive of reimbursement for expenses reasonably incurred. (emphasis added).

¹⁰² See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 151-53 (1967).

one step towards the evolutionary improvement of the criminal law processes.

Two major difficulties would remain even after the acceptance of the defender concept. Present concepts of indigency are antiquated and not consistent with this modern society.¹⁰³ Tying legal assistance to near-poverty does not take into consideration the realities of the cost of litigation. Improving the quality and quantity of legal assistance available to those people who fit within the present concept of indigency creates inconsistencies not unknown to the American experience. It would mean that people with the lowest and highest incomes could count on adequate legal assistance; the vast majority of Americans in the "middle classes" could not.¹⁰⁴ An American citizen charged with a serious felony has several choices. He can use every bit of savings that he has accumulated towards providing a defense. He can take a second mortgage on his home and add that money to some from his savings, or he can shop around until he finds an attorney who will defend him for much less than that charged by the others. If he takes the latter option, he is nagged with doubts that the "bargain-basement" attorney will perform his services at a level commensurate with the fee. The cost of litigation is outside the realm of probability for most seemingly-affluent people in this society.¹⁰⁵

¹⁰³ Legal definitions tend to vary from a simple lay definition. See WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1961 ed.) which defines indigence as poverty that is usually not severe or total. *Id.* at 1151.

¹⁰⁴ The ABA has proposed an eligibility for assistance standard that provides:

Counsel should be provided to any person who is financially unable to provide adequate representation without substantial hardship to himself or his family Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel PROVIDING DEFENSE SERVICES, *supra* note 23, at 53.

The provision, "without substantial hardship to himself or his family," is said to be included, and rightly so, to emphasize that eligibility is not to be determined on the supposition that one is to be provided counsel only after he has exhausted every financial resource that might be required for other vital personal or family necessities, such as food, shelter, or medicine. At the point at which payment of the fee to retain counsel would inflict substantial hardship on the family unit, or on himself, if he has no family, society's obligation to provide for counsel arises. *Id.* at 54.

¹⁰⁵ Another factor compounding the complexity is the much commented upon question of who can best make the determination of indigency. Indicating the variables, one author has said:

The best way to determine eligibility will vary from place to place, depending on such factors as the volume of criminal cases handled by the court, the stage of the prosecution when the determination is made, how well the person making the decision is likely to know the defendant, and whether the jurisdiction uses a defender or assigned counsel system. L. SILVERSTEIN, *supra* note 14, at 116.

He concludes by generalizing that "the greater the population served by the court, the more elaborate must be the system for determining eligibility." *Id.*

Legal fees, while certainly not exorbitant, are outside the range that most people in this country can afford to pay, and when other services are necessary to the preparation of a successful defense—services such as investigators and expert witnesses—the costs become prohibitive. In most states, a person is either an indigent—i.e., almost impoverished—or he is not; the courts tend not to recognize an area in between. In between are the people who will continue to be neglected even after the adoption of a defender-organized structure.¹⁰⁶

Another problem not resolved by the acceptance of the defender concept is one that weakens the integrity of the courts and the legal profession: the over-zealousness exhibited by some prosecutors and some defense attorneys in pursuing conviction or acquittal, regardless of the circumstances of the case and the interest of society. The criminal law is still plagued by cases of misuse of evidence by prosecutors or the withholding of the names of witnesses who may aid the defense.¹⁰⁷ On the other side of the coin is the controversy that recently raged over how far an attorney should go in permitting his client to take the witness stand and perjure himself, and in fact, whether the attorney should help the client to do so.¹⁰⁸

These goals, then, the extension of legal services to the vast numbers of people in need of it who do not fit within present concepts of indigency and the elevation of the practice of criminal law from a battle of wits and deceit between two lawyers to a position befitting its importance involving the liberty of citizens, must be the focal points of any future planning. Depending upon the willingness of the society to invest substantial resources in the defense of citizens accused of crime, the public defender system could be greatly expanded to provide additional services to more persons.

The second goal, however, is more illusive. A professional defender operation will command the respect of the prosecutor, a situation which may result in fairer dealings than presently exists in the criminal law. But will this "equal footing" between defender and prosecu-

It has been suggested, that instead of a magistrate, a reference panel selected by the Public Defender or a separate administrative unit of the court could best determine the question of indigency. See *EQUAL JUSTICE FOR THE ACCUSED*, *supra* note 20, at 85-88.

¹⁰⁶ It would seem that in Iowa, where the magistrate appoints the counsel, the tests of indigence are not as strict as in other states. See *Schmidt v. Uhlenhopp*, 258 Iowa 771, 140 N.W.2d 118 (1966) (The question is not whether the defendant might be able to pay for counsel, but whether he was actually able to employ counsel).

¹⁰⁷ See, e.g., *Brady v. Maryland*, 373 U.S. 83, 84 (1963); *Miller v. Pate*, 386 U.S. 1, 6 (1967); *McMullen v. Maxwell*, 3 Ohio St. 2d 160, 168, 209 N.E.2d 449, 453 (1965).

¹⁰⁸ See *Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

tor also escalate the hyper-hostility between the two? Perhaps the root of the problem may not be in the inequality of the sides but in having lawyers who are defense-or prosecution-oriented. Any design for the future must squarely face this and be based upon competent attorneys specializing in criminal law who are not fiercely loyal to abstract concepts of prosecuting or defending but are, instead, committed to the concepts of due process of law and arriving at just results. Such a breed of lawyers and such an institution hardly seems feasible within the framework of our existing system.

What is called for, then, is a new institution. While quite foreign to the profession's concepts of handling these problems now, such an institution may not be too far in the future.

B. Urban Departments of Justice

It is proposed here that in each urban area exceeding 75,000 in population a Department of Justice be organized and that the community devote its resources not to prosecuting or providing defense services but to securing justice within its courts. The Department should be headed by an appointed director responsible to the chief executive of the community. Rationality suggests that the Department be organized across city lines and serve metropolitan or regional areas.

Within the Department of Justice should be five divisions, with division heads accountable to the director. These divisions could include all justice-associated functions presently balkanized into many uncoordinated agencies. A principal aim must be to coordinate each agency whose operations contribute to the quality of justice within the community and thereby to pool resources and eliminate duplication of effort.

The first obvious inclusions into the Department would be the offices of the Public Prosecutor and Public Defender. Operating as two separate divisions, each would be staffed by a lawyer designated as the Prosecutor or Defender, and each would be supplied with an administrative and clerical staff. Neither office, however, would include a staff of attorneys, nor would the Prosecutor or Defender try cases. All actual case handling would be assigned to Department of Justice staff attorneys who would take assignments in each division. The Prosecutor, Defender and staff attorneys should be civil service appointments to encourage career staffing and to discourage political manipulation. The jobs of the Prosecutor and Defender would entail supervision of the staff attorneys in their handling of each case and would require their approval of any agreement reached between the staff attorneys handling a particular case. The staff attorneys, who would not be committed to either office, would be involved only in

the cases to which they have been assigned and would also receive assignments from the other divisions. It is likely that a staff attorney would be handling assignments from the Prosecutor's and Defender's divisions at the same time as well as handling assignments from other divisions. Under this approach time-wasting devices and delaying tactics can be eliminated and the goal of justice—substituted for the drive to convict or free—can be implemented.

The Departments' third division would serve to administer the entire judicial system in the community. The chief of the Administration Division should be charged with the task of organizing all court calendars in the community and judicial assignments. Also instituted would be a universal pre-trial requirement to narrow the issues and encourage resolution of the conflict without a trial. A pre-trial referee could be drawn from the Department's staff attorneys, who would be given this task in a standard rotation between assignments in the Prosecutor's and Defender's offices.

As part of the pre-trial procedure all agreements as to pleas of guilty and reduction of charges should be reviewed. After agreements were approved by the Prosecutor and Defender, the staff attorney assigned on each side of the case might meet with the staff attorney-referee to review the terms of the agreement. In addition, it would be wise to institute a review of the evidence at this point to ascertain that the accused had actually committed the crime to which he would plead guilty. These findings and the terms of the agreement between the attorneys could then be submitted to the judge. It is time to face up to the acceptability of plea bargaining and to disclose all agreements that have been reached. With the proper safeguards, which will be supplied by the pre-trial referee's review of the case, evidence, and agreement, this method of disposition will be not only the speediest but probably the most equitable. It would have the effect of introducing into the plea bargaining exercise an actual concern for guilt and innocence which often seems to be lacking under current procedures.

Essential to any consideration of improving the administration of justice must be a concern for the reorganization, redirection, and re-education of the police. One of the problems with law enforcement today is the lack of coordination between police forces and the other agencies charged with the responsibility of administering justice. The current cry for law and order is an invalid one if it does not include a plea for justice. Justice as an element of law and order is essential if this society is in any way to distinguish itself from authoritarian societies and systems of government. Just as the military is not free to determine foreign policy in this country, nor for that matter the aims to be sought in armed conflict, the police should not be invested

with corresponding policy-making power. Much of the disrespect for law and order today stems from police misconduct—or “overreaction”—and failure of police all over this country to abide by the laws themselves in carrying out official duties.

The police department of any metropolitan area must be relieved of the authority to act independently of the administration of justice. To this end, the police should be incorporated into the Department of Justice as a separate division, with the division chief, or commission, responsible to the Director. In mitigation of the role that the police have played, it should be clearly understood that many policy decisions have been made within police departments solely because they received neither directive nor guidance from any other public agency. The Director must ultimately be responsible for the selection, through civil service, and the training of all members of the police force. That training should include extensive background in the areas of criminal law, procedure, civil rights and liberties, and community relations. It is outrageous to decry lawlessness on the part of the community and yet condone the failure of law enforcement officials to abide uniformly by the rules and restrictions enunciated by the courts. Furthermore, in this restructuring the police should also be relieved of the power to review the activities of their own members. Charges of misfeasance and nonfeasance should be handled through the division of Administrator and a staff attorney assigned to investigate and evaluate the complaint. Similarly, disciplinary action should not be left to the police department but should be administered by the Director.

The inclusion of the police within the Department will have additional benefits. The Prosecutor's and Defender's divisions can make full use of the investigative services and laboratory facilities that should be a part of a twentieth century metropolitan police department. Instead of separate investigative departments within each division, resources can be conserved by having one excellent police department within the agency. This will especially benefit the Defender who today in most cities is completely barred from police investigative services and their reports. An advantage will also be gained by the Prosecutor who today theoretically is entitled to police assistance but who, in actuality, receives those services only if good relations are maintained between the agencies. Bringing all together within one department will facilitate cooperation and an understanding of the difficult tasks that each agency must bear.

The fifth and final division should be social services encompassing probation and parole departments and all other agencies whose work is an integral part of the administration of justice in any community. Probation and parole, like the police, have too long been separated

from the mainstream of judicial administration. Assigned to this division should be a full complement of psychiatrists and case workers whose assistance will make probation and parole officers' work much more meaningful. Contained within any pre-sentence report on an accused should be a report of a psychiatric examination. Recommendations as to the nature and type of confinement, if any, would be most beneficial to the accused and society. This, of course, is just a beginning, but rehabilitation of the individual must be incorporated into the actual disposition of the case if any dent in recidivism is to be made. The present methods of case disposition are geared to disposing of the docket, not to the needs of the individual or of society.

Another inadequacy of the present system can be alleviated through this organization, that of the current practice of shopping for psychiatric testimony until one or more psychiatrists is found who will substantiate the position taken either by the prosecution or the defense. The services of the psychiatrists employed within the Special Services division should be utilized for testifying. The psychiatrist would be assigned by the Division of Administration and thus be neither the Prosecutor's nor the Defender's witness. The attorneys should be bound by the psychiatric reports within the Department.

The establishment of a Department of Justice will insure prompt and continuous legal assistance for all persons arrested and charged with crime. The second part of this proposal would implement that quest. As soon as an individual is arrested, brought to the police station and booked, he should be informed that he has a right to the assistance of counsel. If he has his own private attorney and wishes to call him, he should be permitted to do so immediately. If he does not have an attorney, one must be assigned to him at that moment. The accused should further be informed that if he does not have the resources to pay for counsel, that assistance will be supplied by the community. Assignment of counsel, however, should not be confined to that group of individuals presently fitting into the classification of indigency. Each person arrested who does not indicate a desire to contact a particular attorney should be assigned counsel. Later, through the Social Services division, when a thorough investigation of the accused's background is made, a determination of the accused's ability to pay for his defense can also be determined. The accused should be charged a fee equivalent to the finding of the Social Services division of his ability to pay and that money should go into the general fund of the community. In short, every member of the community would be entitled to legal assistance provided by the community, if he wished, but he would have to pay a fee for those services commensurate

with his resources. The present all-or-nothing indigency standard denies legal assistance to some who need it and provides it for others who could pay at least part of the costs of their defense.

V. CONCLUSION

From the moment of arrest through sentencing procedures, the system of criminal justice is in need of reform. It is in need of a re-dedication to the basic concept of due process of law—that the government will deal fairly with its citizens regardless of their race, status, age, influence, and financial means. Today, the question of whether formal charges are to be made, the nature of the charge actually filed, the quality of the hearing that the accused receives and the penalty that will be imposed if the defendant is convicted are too often pre-determined by that defendant's station in life.

The system has not developed the way it has because of malice on the part of the participants. Judges and lawyers, themselves, have become captives of the system they pretend to administer. And that system is unmanageable. Structurally the same in counties with a population in excess of one million people as in counties with a population of less than twelve thousand people, the present administration of justice was designed to service a rural country that did not envision the population explosion and, more important, did not envision the urbanization and subsequent depersonalization of American cities made inevitable by the mass migration from the country. Answers to the perplexities have not been found in merely increasing the personnel in urban courts for that does not restore the individualization found in small communities.

The purpose of a criminal court system in a democratic society is to insure ordered liberty. Courts removed from the people they serve cannot insure ordered liberty. They can only wage an increasingly unsuccessful holding action against growing disorder, as they are unable to adjust and cope with what is, in essence, a growing revolutionary society. The quest for order has now totally supplanted the quest for justice, for justice is the first victim in a courtroom where the judge's primary concern must be in keeping his docket current. This "supermarket" justice dispensed in urban criminal courts can only further weaken a society where increasing numbers of people are discontent and are questioning the validity and integrity of that society's institutions.

In the area of criminal justice this nation must reject its attachment to judicial structures and apparatus devised for a way of life that no longer exists. What links this age with that period when the country was being formed and the machinery developed is not the machinery, as many people think, but the principles and ideals behind that ma-

chinery. Slavish devotion to the mechanics of justice has caused us as a people to lose sight of the underlying principles. It is submitted here that the creation of urban Departments of Justice will help us once again to confront those principles and enable us to make equal justice a reality in this society.